The Commission of Inquiry
Concerning Certain Activities of the
Royal Canadian Mounted Police

National Security:
The Legal Dimensions

A Study prepared for the Commission

by

M.L. Friedland

NATIONAL SECURITY:
THE LEGAL DIMENSIONS

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June, 1979

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A Note by the Commissioners

An important part of the terms of reference of our Commission of Inquiry (P.C. 1977-1911) reads as follows:

(a) to advise and make such report as the Commissioners deem necessary and desirable in the interest of Canada, regarding the policies and procedures governing the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada, the means to implement such policies and procedures, as well as the adequacy of the laws of Canada as they apply to such policies and procedures, having regard to the needs of the security of Canada.

Professor Friedland's study discusses many important issues that have a bearing on this aspect of our terms of reference. Indeed, while the opinions he expresses are his own and not necessarily those of the Commission or of the Government of Canada, we hope that his paper will provoke and stimulate the reader to express his or her own considered views to the Commission by writing to it at:

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Preface

This study was prepared for the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police. I am grateful to the members of the Commission and to the Commission's Director of Research, Peter Russell, for asking me to investigate this fascinating area of law and policy. They have given me full access to classified material. They have also given me very helpful advice on various aspects of my research, as have others connected with the Commission, in particular John Edwards, the Special Adviser to the Commission. The opinions expressed in this study are, of course, my own and do not necessarily reflect the views of the Government of Canada or the Commission of Inquiry.

I am greatly indebted to Christopher Grauer, who has just completed his final year, and Ian Kyer, who is about to enter his final year in the Faculty of Law, for their valuable research assistance. I am also grateful to Julia Hall and Patricia Dawson for their expert secretarial and administrative assistance.

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June, 1979

NATIONAL SECURITY: THE LEGAL DIMENSIONS

Part One
INTRODUCTION

I start this study on the legal dimensions of national security with a confession: I do not know what national security means. But then, neither does the government. The Solicitor General stated in early June, 1978 before the House of Commons Standing Committee on Justice and Legal Affairs:[1] "There is no definition of the term 'national security' because in effect national security is basically a term that refers to protection of sovereignty, and activities related to the protection of national sovereignty." It is one of those terms after which one should add the phrase "whatever that means", as Mr. Justice Black did in the United States Supreme Court.[2] Some view the concept as one that they cannot define, but, like obscenity,[3] they know it when they see it. This was the view of the U.K. Committee of Privy Counsellors on Ministerial Memoirs, which in 1976 stated:[4] "National security is a vague enough idea in the conditions of the modern world and its subjects range much further afield than the simpler categories of earlier days, such as the plans of fortresses or the designs of warships or aeroplanes. Nevertheless, experience has shown that, when it comes to a practical issue turning on a particular set of facts, it is not usually difficult to agree whether they fall within or without the security net."

The phrase "national security" is not used in Canadian legislation. The justification for its use in this paper is that it is commonly used as a convenient way of describing a range of matters from "espionage" to "subversion", words which, as we will see, turn out to be as vague as the concept of national security itself. Using the label "national security" does not, of course, solve any given problem. In each case one must determine the precise question in issue and then weigh the various interests that warrant consideration. The purpose of this paper is to analyze the range of problems that tend to come under the label "national security."

This paper is not directly concerned with the structure of the Canadian Security Service, nor the Government's responsibility for its operation. I will leave the task of examining those two important topics to others. Nevertheless, a very brief description of Canada's Security Service may assist in placing this paper in its proper context.

"The Security Service in Canada", succinctly states a former R.C.M.P. Deputy Commissioner, William Kelly,[5] "is under the control and direction of the Commissioner of the R.C.M.P., who is responsible to the Solicitor General of Canada in all matters, including those of security." There is no statute outlining the structure of the Security Service. Section 18(d) of the Royal Canadian Mounted Police Act[6] simply permits the Cabinet to prescribe that the force "perform such other duties and functions as are prescribed by the Governor in Council or the Commissioner." A Regulation passed under the Act[7] provides that the R.C.M.P. is "to maintain and operate such security and intelligence services as may be required by the Minister." No doubt it would be better to have the framework for the Security Service more fully spelled out in legislation and regulations.[8] Robin Bourne, the former head of the Security Planning and Analysis Group in the Solicitor General's Office stated[9] in 1976 that written terms of reference do exist, but they are in the form of a Secret Cabinet Directive ...." The then Solicitor General, Francis Fox, relying on the Secret Directive, outlined in the House of Commons in October, 1977 the function of the Service.[10] This Directive, approved by the Cabinet in March, 1975,[11] was made public in July, 1978[12] by the present Commission of Inquiry with the permission of the Privy Council. According to the directive, the Cabinet agreed that:

> "the RCMP Security Service be authorized to maintain internal security by discerning, monitoring, investigating, deterring, preventing and countering individuals and groups in Canada when there are reasonable and probable grounds to believe that they may be engaged in or may be planning to engage in:
>
> i) espionage or sabotage;
> ii) foreign intelligence activities directed toward gathering intelligence information relating to Canada;
> iii) activities directed toward accomplishing governmental change within Canada or elsewhere by force or violence or any criminal means;
> iv) activities by a foreign power directed toward actual or potential attack or other hostile acts against Canada;
> v) activities of a foreign or domestic group directed toward the commission of terrorist acts in or against Canada; or
> vi) the use or the encouragement of the use of force, violence or any criminal means, or the creation or exploitation of civil disorder, for the purpose of accomplishing any of the activities referred to above."

The 1969 Report of the Royal Commission on Security (the Mackenzie Report)[13] recommended that a civilian organization replace the security function of the R.C.M.P., but this was not accepted by the Government,[14] and instead a civilian director was appointed. Prime Minister Trudeau stated in the House in June 1969:[15] "we have come to the conclusion that current and foreseeable security problems in Canada can be better dealt with within the RCMP through appropriate modifications in their existing structure than by attempting to create a wholly new and separate service." In addition, a separate advisory policy group was later set up in the Solicitor General's Department.[16] The Solicitor General at the time, Jean-Pierre Goyer, stated[17] in the House in September 1971 that the function of the Group is:

"1. to study the nature, origin and causes of subversive and revolutionary action, its objectives and techniques as well as the measures necessary to protect Canadians from internal threats;

2. to compile and analyze information collected on subversive and revolutionary groups and their activities, to estimate the nature and scope of internal threats to Canadians and to plan for measures to counter these threats;

3. to advise me on these matters."

The relationship between the Security Service and the Cabinet has not been made public. Suffice it for our purposes to quote again William Kelly who states[18] that there are "a series of committees to establish security policies and to deal with security problems, the senior committee being the Cabinet Committee on Security." Canada, according to Kelly,[19] "has not now and never has had an intelligence service," that is, an established foreign espionage service like the American C.I.A. or the British MI6. "It is true," he concedes,[20] "that Canadian diplomats obtain much information ... but they obtain this information in the course of their regular duties, and make no effort clandestinely to obtain unauthorized information."

This paper concentrates, for the most part, on criminal offences and police powers. It does not purport to cover the whole field of national security. For example, there are no sections with respect to controlling the security of persons coming into the country (immigration and visas) or of persons leaving the country (passports). Nor is there any discussion of techniques for controlling the security of government establishments or of government employees. Nor does the paper deal with the surveillance (without using special powers of search) of individuals or groups within society by the Security Service or the military.

What the paper does examine are the offences that come under the head of national security, such as treason and sedition and offences under the Official Secrets Act.[21] These are the subject matter of Part Two of the paper. The Official Secrets Act leads to a discussion in Part Three of government information, including Crown Privilege and Freedom of Information laws. Part Four examines the powers that the police have to investigate conduct involving subversion and espionage and includes a discussion of emergency legislation. The role of the judiciary in the area of national security is a question raised throughout the paper and this is dealt with in Part Five. Finally, there is a summary of some of the conclusions in Part Six.

Part Two

CRIMINAL OFFENCES AND NATIONAL SECURITY

The use of the criminal law to protect the security of the nation is usually taken for granted. In this Part the offences which now form part of the state's arsenal are examined. What are the offences? How did they develop historically? Do other nations have comparable laws? To what extent should the criminal law be used in these cases? What should the scope of these offences be? In a later Part the procedures and police powers used in national security cases are explored. Here only the substantive criminal law is examined.

In Canada the offences relating to national security are contained, for the most part, in two Federal Acts: the Criminal Code[1] and the Official Secrets Act.[2] Surprisingly little study has been made of them in Canada. The Mackenzie Commission simply lists in one paragraph a number of Criminal Code provisions that "may be relevant to security"[3] and then devotes two paragraphs to part of the treason section dealing with espionage.[4] Twelve paragraphs are devoted to the Official Secrets Act.[5]

Most of the Criminal Code offences are found in Part 2 of the Code, "Offences Against Public Order". However, not all offences in Part 2 — for example, engaging in a prize fight[6] and duelling[7] — can be considered as coming within the scope of national security; and some offences outside Part 2, such as advocating genocide[8] and other aspects of hate propaganda[9], can be.

Because the Federal government has exclusive jurisdiction over criminal law and procedure,[10] relevant provincial offences necessarily relate to the furtherance of provincial objects, such as controlling the activities of the provincial and other police forces.[11]

The Law Reform Commission of Canada has been examining Criminal Law and Procedure but has not yet issued any studies, working papers or reports on the national security aspects of the substantive criminal law. It has, however, looked at Crown Privilege in its Evidence Code[12] and is presently examining some relevant aspects of police powers such as writs of assistance.[13]

The comparable body of American law is found in both federal and state legislation; unlike Canada, the states in the U.S. have the residual criminal law power. The U.S. Federal law is now, for the most part, contained in Title 18 of the U.S. Code. The entire U.S. Federal criminal law was examined in the late 1960s by a Federal Commission, the National Commission on Reform of the Federal Criminal Laws, under the chairmanship of Edmund Brown, a former Governor of California, which reported in 1971.[14] President Nixon was less

than happy with their product and in 1973 introduced his own version of a Federal Code, known as S. 1400. For over five years there have been various versions of the Code debated in Congress, including the much debated version known as S. 1. The offences relating to National Security have proven to be some of the most contentious sections.[15] At the time of writing, a Bill, which excludes many of the more controversial sections, is working its way through Congress.[16]

In contrast to Canadian and American law, the U.K. law is scattered over a large number of separate Acts. The English Law Commission is trying to codify the Criminal Law, but they are many years away from completing the task. A Working Paper in 1977 dealing with treason and sedition is their first effort in the area of national security.[17]

The Official Secrets Act will be dealt with in later sections. It cannot be looked at in isolation from the Criminal Code offences because not only are there espionage provisions in the Code, but charges against the Official Secrets Act are now used in cases where in the past treason might have been charged.[18]

The legislation relating to such offences as treason, sedition and espionage is deceptively short and simple, but it is extraordinarily complicated. There are a number of reasons for this. One is history. In treason, for example, the key statute in England is still the Treason Act of 1351[19] and although there are more up-to-date formulations of treason in Canada[20] and the United States[21] the cases under the 1351 Statute, such as the treason trials of Roger Casement[22] after the First World War and William Joyce[23] after the Second, are still very relevant. That statute, passed in the reign of Edward III, over 600 years ago, has been used to cope with virtually all serious threats to English society, internal and external, and as we shall see some not so serious, and so it is no wonder that the law of treason is complicated. These threats were not limited to the rather unsophisticated legislation in 1351 which talked of "levying war against the King" and "compassing" his death. Over the centuries the Act has been employed to deal with a variety of apparent threats to the state arising from economic and political changes. The 1351 Law of Treason even helped Henry VIII rid himself of two of his wives because it was (and still is in England)[24] treasonous to have sexual relations with the King's consort — even with the consort's consent — and therefore it was treason for Anne Boleyn and Katherine Howard to be a party to these treasonous acts.

Sedition is also complex because, unlike treason, its origins are unclear, and, like treason, it has been used to deal with a large variety of changing threats to the structure of English society. It appears likely that is was introduced in the early part of the 17th century to counter the growing threat caused by the widespread use of the printing press.[25] An analysis of criminal offences in relation to changing technology would make a fascinating study: explosives (an early case where three persons with explosives were charged with treason);[26] delayed explosives (emergency legislation in England);[27] atomic weapons (the *Chandler* case);[28] photography (the 1911 Official Secrets Act);[29] xerography (heightened concern over leakage of documents, as in the *Pentagon Papers* case);[30] and no doubt one could make similar points for the telephone and space satellites.

The Official Secrets Act is similarly complex. This is not because its origins are lost in history — its relatively short history, with the first statute in 1889, is well known. It is because the nature of the subject matter is complex. The Act has two major offence-creating sections, one dealing with espionage and one with "leakage" of information. The Act treats most information and individuals as if there were only one type of information and one type of individual involved. But distinctions should be drawn between the type of information, the person releasing it, the person acquiring it, the use of the information, whether the country is at war or peace, and more. Furthermore, the 1911 and 1920 U.K. Acts, from which our 1939 Act was drawn, were passed with extreme urgency and so there was no opportunity for careful Parliamentary scrutiny of the legislation and probably less time than would normally be the case for careful drafting. One can echo the words of the two Columbia law professors who studied the comparable American Espionage Act that "the longer we looked the less we saw."[31] It took them over 150 printed pages to analyze the American Espionage legislation which was first enacted as recently as 1911.

Another complicating factor is that the language used in everyday speech to describe threats to national security is not usually reflected in the criminal legislation. So, for example, there are only two references to "subversion" in Canadian legislation — in the 1973 amendment to the Official Secrets Act, permitting wiretapping in cases of subversion, and in the Immigration Act;[32] "terrorism" is not mentioned in any offence-creating section;[33] the word "espionage" is not to be found in the Criminal Code;[34] and "sabotage" was first used as recently as 1951.[35]

The word "subversion" is often used in connection with national security, but it is as elastic as "national security" itself and would only create further problems if it were used as an offence. The danger in using the concept can be seen from the definition of it given by a former R.C.M.P. Deputy Commissioner, William Kelly: "To subvert is to overturn, upset, effect the destruction or overthrow of such things as religion, monarchy, the constitution, principles or morality."[36] Few people could escape being caught by that definition. The concept is open to political abuse because as U.S. Supreme Court Justice Robert Jackson said in 1940 when he was Attorney-General: "Those who are in office are apt to regard as 'subversive' the activities of any of those who would bring about a change of administration."[37] The U.S. Church Committee stated[38] that its "examination of forty years of investigations into 'subversion' has found the term to be so vague as to constitute a license to investigate almost any activity of practically any group that actively opposes the policies of the administration in power."

This introductory note indicates the very wide scope and the complexity of the subject matter of criminal offences and national security. Only a small part of the area can be covered in this study. The offences that are dealt with cover conduct which is not easily compartmentalized. Many of the offences merge into each other in law and fact. They do so in law because many offences overlap; for example, some treasonous conduct can also be charged

as seditious conspiracy and in many cases a traitor will also be in breach of both the espionage and leakage sections of the Official Secrets Act. They merge "in fact" because "subversive" conduct is often on a continuum;[39] an unlawful assembly[40] can become a riot,[41] which in turn may become a seditious conspiracy,[42] which may in turn result in treasonous conduct.[43]

I. Treason

Treason is, as the English Law Commission has recently stated,[1] "the most serious offence in the calendar of crimes." Although there have been relatively few cases in Canada in which the state has brought treason charges, those occasions have marked crucial events in Canadian history.

The earliest recorded case was the trial of the American, Maclane,[2] in 1797 in Quebec City before Chief Justice Osgoode (after whom Osgoode Hall was named). Maclane was tried and convicted of trying to raise a rebellion in Lower Canada in connection with a potential French invasion. Then there were convictions in the "Bloody Assize" of 1814 following the War of 1812: nineteen men (including two Americans) had been captured while aiding American raiders in 1813.[3] The list would also mark the trials of some of those who took part in the Mackenzie uprising in 1837 (two were hanged, but not Mackenzie who went to the United States and did not return until the amnesty of 1849);[4] the later trials in 1838-9 of the American invaders (seventeen were hanged) who tried to complete the work of Mackenzie and Papineau;[5] the trial of Louis Riel[6] for the Métis Rebellion in Saskatchewan in 1885; and the treason trials during the First World War.[7] The six reported First World War prosecutions[8] involved relatively insignificant conduct; four out of the six were for helping enemy aliens leave Canada,[9] one was for assisting the German Emperor to obtain an invention,[10] and one was for lending $472.50 to the Austro-Hungarian government.[11] In four cases the convictions were quashed;[12] one was upheld;[13] and the other was reported only on the bail application hearing.[14] The First World War trials were the last in Canada; henceforth the Crown, as in the prosecutions following the Gouzenko revelations, used the Official Secrets Act, and during the Second World War the Treachery Act[15] was available.

A similar pattern can be observed in England[16] where the Official Secrets Act, as in the *Blake* case in 1961,[17] and, during the war, the Treachery Act[18] have been used. The last U.K. treason prosecution[19] was the *Joyce* case in 1946,[20] where Joyce, otherwise known as Lord Haw-Haw, was convicted of treason for broadcasting propaganda for the Germans.[21]

A. *The Criminal Code*

In Canada, treason is defined in section 46 of the Criminal Code and consists of harming the Queen,[22] levying war against Canada,[23] assisting an enemy at war with Canada[24] (which since 1951[25] also includes assisting armed forces against whom Canada is engaged in hostilities even though a war has not been declared), using force for the purpose of overthrowing the government of

Canada, or a province,[26] or divulging military or scientific information to a foreign state.[27]

A distinction is drawn in the Code between the first three categories which are called high treason and the last two which are simply treason. This distinction was not in the 1953-54 Code; there, all were treated as treason. The death penalty was not imposed, however, for every treasonable offence; the penalty ranged from 14 years to death.[28] The distinction first came in when capital punishment was abolished in 1975, presumably to distinguish between those cases where formerly there was a mandatory death sentence and those where there was not.[29] But the division adds further confusion to an already difficult section. In any event, violent overthrow or divulging military secrets can be, and often are, more serious than some of the charges of assisting the enemy, such as the previously mentioned ones that were committed during the First World War.

We will turn to a discussion of some of the unique characteristics of treason after we have very briefly examined its historical development.

B. *Historical Development*

Although the Canadian treason sections were "modernized" in the 1953-54 revision of the Code they still clearly show their derivation from the English Treason Act of 1351, which is still in force in England today. The 1351 Act reads as follows:[30]

> "Whereas divers opinions have been before this time in what case treason shall be said, and in what not; the King, at the request of the lords and of the commons, hath made a declaration in the manner as hereafter followeth; that is to say, When a man doth compass or imagine the death of our lord the King, or of our Lady his Queen, or of their eldest son and heir; or if a man do violate the King's companion, or the King's eldest daughter unmarried, or the wife of the King's eldest son and heir; or if a man do levy war against our lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere, and thereof be provably attainted of open deed by the people of their condition. And if a man counterfeit the King's great or privy seal, or his money; and if a man bring false money into this realm, counterfeit to the money of England, as the money called Lushburgh, or other like to the said money of *England*, knowing the money to be false, to merchandise or make payment in deceit of our said lord the King and of his people; and if a man slay the chancellor, treasurer, or the King's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places, doing their offices. And it is to be understood, that in the cases above rehearsed, that ought to be judged treason which extends to our lord the King, and his royal majesty: and of such treason the forfeiture of the escheats pertaineth to our sovereign lord, as well of the lands and tenements holden of other, as of himself.

The Statute was passed for very practical reasons; as Plucknett has said,[31] "there is no trace of political theory in the Act." The Lords induced Edward III to pass the Statute in order to limit the extensions of the law of treason by His Majesty's judges. The judges in the first half of the century had tried to

extend the law of treason to include, for example, highway robbery and abduction of women.[32] The Lords were concerned about this extension for two reasons: if it was treason and not felony then benefit of clergy (which prevented punishing those who could read) was not applicable; and, perhaps more important, if it was treason the convicted person's property was forfeited to the Crown whereas if it was a felony the convicted person's lord received his property. (The Lords had established this latter principle in Magna Carta in 1215.)[33]

In future, therefore, treason could only be developed by statute — or by the construction of the 1351 Act. There were periodic statutory extensions of the law of treason in emergency cases.[34] (One emergency was a rash of arson cases in Cambridge.)[35] But the statutes were usually short-lived and can be thought of as the equivalent of emergency war measures legislation.[36] The one King who appeared to ignore the 1351 Act was Richard III and in spite of recent attempts to demonstrate that he has been improperly maligned in the history books, the evidence suggests that Shakespeare was correct in showing that he ignored the law and practice in treason cases.[37]

There were, however, many judicial extensions of the 1351 Act.[38] "Levying war" was expanded to include what we would now consider the offence of riot; in one case, for example, a court held that riotously pulling down brothels was treasonous conduct![39] Compassing the King's death was expanded to cover cases where the King was personally in no danger; in the previously mentioned Canadian case of *Maclane* in 1797,[40] the accused was convicted of treason even though George III was 3,000 miles away and in no physical danger.[41]

These judicial extensions were given a statutory foundation in England in 1795[42] and in Canada in 1797.[43] A further statute was enacted in 1848 in England[44] followed by Canadian legislation in 1868[45] which allowed some of this conduct to be treated as felonies, not all punishable by death, so that juries would be more inclined to convict.[46] The conduct might also be treasonous, however, under the 1351 Act.

The English legislation is now being reviewed by the English Law Commission which has concluded in its Working Paper No. 72 that it is "apparent not only that a restatement of the law is required, but also at least some reform."[47]

The United States law of treason[48] substantially repeats the language of their Constitution[49] which states "Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." (The section goes on to provide: "No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court. The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.") It will be noted that the opening language is very similar to the 1351 English statute, although it does not include compassing the President's death.[50] The Brown Commission recommended a reformulation and narrowing of the offence of treason.[51]

C. *Special Features of the Law of Treason*

There are a number of special features of the law of treason, many of which expand its scope and others of which limit the ability of the Crown to prove the charge. These are touched on in this section.

The first point to note is that unlike almost all the offences in the Criminal Code, including, for example, murder, Canada assumes jurisdiction for treasonous offences committed outside of Canada if committed by "a Canadian citizen or a person who owes allegiance to Her Majesty in right of Canada."[52] The *Joyce* case[53] established the much disputed principle[54] that a person who is still in possession of a country's passport owes allegiance to the country. The English Law Commission has rightly stated that "any new definition of treason should make it clear to whom it is to apply" and has left out the concept of allegiance in its tentative proposals.[55] (Persons who commit offences within Canada, even though aliens, are covered by the language of s. 46.)[56] A similar extra-territorial extension of the criminal law applies to the Official Secrets Act[57] and there is now a growing list of such extensions in the Code.[58] Yet one wonders why some "offences against public order" are given extra-territorial effect, whereas other serious public order offences such as sabotage[59] and inciting to mutiny[60] are offences only if commited in Canada.

Again, unlike every other criminal law offence,[61] it is an offence for a person who knows that treason is about to be committed not to inform the police or a justice of the peace.[62] This is, in fact, different from the comparable English law (referred to as "misprision of treason") which makes a person guilty if he has reasonable grounds to believe that a person *has* committed treason and does not inform the authorities.[63] In Canada it is not an offence to fail to reveal a treasonous offence that has already occurred, while in England it is an open question whether it is an offence not to reveal a contemplated treason.[64] The English Law Commission in its Working Paper on Treason has taken the position that the offence of misprision both in relation to an offence that has been committed and to one that is contemplated should be included in legislation, "certainly in relation to the offence of treason in wartime."[65] Should the Canadian law be drafted to include offences already committed and also be limited to wartime?

Attempted treason raises questions that are not easily answered. Is there such an offence in Canada? It is said not to exist in England in relation to compassing the sovereign's death,[66] and in 1917 the Alberta Court of Appeal held that "the Code does not contemplate such an offence as an attempt to commit treason."[67] It can be argued that an attempt offence is not needed because the act which would satisfy the attempt section would make the offence treason. Attempting to kill Her Majesty is specifically mentioned in s. 46(1)(a) and doing any act preparatory to levying war is mentioned in s. 46(1)(b). (This appears to make an accused guilty for conduct before an attempt because s. 24(2) provides that "mere preparation" is "too remote to constitute an attempt".) Moreover, s. 46(2)(d) provides that everyone commits treason who "forms an intention" to engage in certain treasonable conduct "and manifests that intention by an overt act." (This is much less onerous for the Crown than

relying on the attempt section.) This applies to four out of the five categories of treason set out in s. 46. The provision does not apply, however, to the section on divulging of military or scientific secrets[68] and so an attempt to communicate such information will only be an offence if the general attempt section[69] applies. If such a case arose it is likely that a Court would hold that the attempt section was applicable and distinguish the Alberta case which was decided at a time when the attempt section did not apply to cases where the punishment was death (there were special provisions for attempted murder and rape). Now, s. 421 specifically provides for an attempt in such a case: "every one who attempts to commit ... an indictable offence for which, upon conviction, an accused is liable to be sentenced to death or to imprisonment for life, is guilty of an indictable offence and is liable to imprisonment for fourteen years."

The concept of the "overt act" used in treason cases in a sense both limits and expands the offence of treason. It appears to limit the offence because an intention must be manifested "by an overt act." But in reality it expands the offence because, as we have seen, it attracts criminal liability at a stage earlier than would the general law of attempt.[70] Treason, then, is the only crime where bare intention, plus very little more, constitutes an offence.[71]

One question which has caused much debate is whether words alone, whether spoken or written, but unpublished, can satisfy the overt act requirement.[72] In Canada the Code inferentially solves the problem by referring to treason committed by "open and considered speech."[73]

There are, however, several safeguards. The first is that the evidence of only one witness is insufficient "unless the evidence of that witness is corroborated" by other evidence.[74] In fact, this is less than the requirement first enacted in England in 1696[75] requiring two witnesses to the overt act or the requirement in the American Constitution, previously mentioned, that "No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."[76]

Secondly, there are limitation periods not found for most other offences in the Code. There is a three year limitation period for the offence of using "force or violence for the purpose of overthrowing the government of Canada or a province."[77] It is difficult to see why there is a limitation period in this single case, and not for other cases of treason or for seditious conspiracy aimed at using force or violence to overthrow the government. (The U.K. 3 year limitation provision enacted in the Treason Act of 1695 applies to all treason offences committed in the U.K. with the exception of offences relating to assassinating the Sovereign.)[78] There is also a curious provision[79] which provides a six day limitation period when the overt act of treason relied on is the spoken word, a provision not applicable to seditious speech, nor when the overt act is conspiracy, nor if the words are recorded or broadcast.

The final unique feature of treason, which is mentioned for historical reasons, is the special punishment which was imposed in treason cases. This was eliminated in England in 1814[80] and in Canada in 1833.[81] Capital punishment is still possible in England for treason, but was eliminated in Canada in

1975. The traditional treason punishment can be best illustrated by quoting Chief Justice Osgoode's statement in the previously mentioned 1797 treason case in Quebec:[82]

> "It remains that I should discharge the painful duty of pronouncing the sentence of the law, which is, That you, David Maclane, be taken to the place from whence you came, and from thence you are to be drawn to the place of execution, where you must be hanged by the neck, but not till you are dead; for, you must be cut down alive and your bowels taken out and burnt before your face; then your head must be severed from your body, which must be divided into four parts, and your head and quarters be at the king's disposal; and the Lord have mercy on your soul."

A number of categories of treasonable conduct deserve more detailed treatment than they have so far received and these will now be examined.

D. *Divulging Military or Scientific Information*

Section 46(2)(b) of the Criminal Code provides that a person commits treason who "without lawful authority, communicates or makes available to an agent of a state other than Canada, military or scientific information or any sketch, plan, model, article, note or document of a military or scientific character that he knows or ought to know may be used by that state for a purpose prejudicial to the safety or defence of Canada."

This subsection first appeared in the Code after the 1953-54 revision. The Royal Commissioners had recommended that a section be added to the treason section making it treason for anyone who "conspires with an agent of a state other than Canada to communicate information or to do an act that is likely to be prejudicial to the safety or interests of Canada."[83] The Government therefore wanted a provision during the Cold War similar to the Treachery Act which applied during the Second World War.[84] The Gouzenko prosecutions had taken place in the late 40s, Klaus Fuchs was convicted in England in 1951, and the Rosenbergs were convicted in 1951 in the U.S. and executed in June, 1953.[85] The existing treason sections would not cover this type of conduct in "peacetime"[86] and the maximum penalty under the Official Secrets Act was only 14 years.[87] In England, without a comparable provision, the Court in the *Blake* spy case resorted to the dubious device of considering each piece of information as a separate offence and imposing a cumulative sentence.[88]

The Commissioners' Report was tabled in the Commons in April 1952, but then went to the Senate for detailed study.[89] The Senators did not want the provision to be in the treason section where the penalty was death: its language was too wide in that the bill simply used the word "information" and also only required prejudice to the "interests of Canada". The Senate therefore removed the provision from the treason section and placed it in a later section where the penalty was 14 years. At the same time they dropped the words "or interests" so that the prejudice had to be to the "safety of Canada."[90] The House of Commons restored the provision to the treason section because of the potential seriousness of the conduct. The Minister of Justice (Garson) stated[91]: "This new sort of treason is in line with the great change which has

come over the offence of treason from what it was in feudal days when it might have been an act of disloyalty to a personal king. But today there could be disclosure of information with regard to the H-bomb or the atomic bomb which might have consequences much more serious for the state than even a personal attack upon the monarch." But in restoring the provision the House narrowed its compass so that "military or scientific information" replaced the simple word "information", and the words "safety or interests of Canada" were replaced by the words "safety or defence of Canada." The penalty was to vary[92] depending on whether it was wartime,[93] when the penalty would be death or life imprisonment, or peacetime, when the penalty would be 14 years, the same as under the Official Secrets Act. One wonders, therefore, whether the subsection adds anything in terms of penalty: if it is peacetime the Official Secrets Act would provide the same 14 year penalty; and if wartime the conduct would be assisting an enemy and thus subject to the penalty for that offence. The one additional element is that it brings a maximum penalty (life) if, during wartime, military or scientific information is given to an ally or a non-belligerent — not conduct, it should be added, which should be treated as the most serious crime in the Code.

It is interesting to note that in earlier periods the treason laws were considered wide enough to cover espionage. In the later middle ages one finds, for example, a conviction for betraying the secrets of the Welsh Castles[94] and espionage for the Scots.[95] Indeed, in a case in 1323 the treason was discovered by the King's spies — an early example of counter-espionage.[96] In later periods there were a number of convictions for espionage activity.[97] The Canadian *Maclane* case[98] in 1797 included espionage as one of the overt acts of treason.

One objectionable feature of the subsection is that by using the words "ought to know" it has introduced an objective test into treason. So, for example, a scientist who, with good motives and without knowledge of the use that will be made of it, sends information on his work at the request of a foreign government employee, would be guilty of treason if he "ought to know" that the information may be used by that state for a purpose prejudicial to the safety or defence of Canada. Surely actual knowledge,[99] or possibly purpose, should be necessary. Although the mental element requirement in the other treason provisions[100] and the espionage section of the Official Secrets Act[101] are far from clear, none of them bases liability on negligence, which is the effect of the "ought to know" provision.

The Mackenzie Commission found it difficult to understand this subsection, stating:[102]

> "These provisions concerning treason in the Criminal Code clearly overlap with the Official Secrets Act. If they are necessary at all, we find their restriction to military or scientific information difficult to understand. If this section remains in the Criminal Code (possibly on the grounds that it may be useful in wartime), it should be expanded to apply to information of all kinds."

There is indeed an obvious "overlap" with the Official Secrets Act. Perhaps the solution is to integrate the espionage sections of the Official

Secrets Act into the Criminal Code so that the various categories of criminal conduct can be set out in a coherent manner. This is a theme which will be developed more fully later.

It should be noted that espionage can also be punished under military law by military courts. Section 68 of the National Defence Act[103] provides that "every person who is a spy for the enemy is guilty of an offence and on conviction is liable to suffer death or less punishment." If the offence were treated as treason then capital punishment would not be possible. The spy is subject to military law even though he is not connected with the military[104], and whether the offence took place in or out of Canada.[105] "Enemy" encompasses more than those countries with whom Canada is at war; it is defined to include "armed rebels" and "armed rioters".[106] But whether the military would or could take jurisdiction in such cases when the civil courts were available is debatable. It would certainly seem to be undesirable for them to do so.

E. *Revolution and Secession*

Using "force or violence for the purpose of overthrowing the government of Canada or a province" is defined as treason under s. 46(2)(a). This was first enacted in this form in the 1953-54 Code. Formerly, revolutions would have been treason under the "levying war" subsection.[107] "Levying war", as we have already seen, has always been given a very wide meaning. Three persons with intent to use dynamite and with a political objective, such as Irish independence, can be guilty of treason in England for "levying war".[108] Does the enactment of section 46(2)(a) mean that such conduct will no longer come within s. 46(1)(b), the "levying war" subsection? This matter is dealt with later.

In England, the question of whether conduct aimed at overthrowing the state should be called treason (there is no question, of course, that it should be punishable in some manner) was considered by the English Law Commission which took the position in its recent Working Paper that the offence should be treasonous, stating:[109]

> "We think that there may be virtue in retaining an offence specifically dealing with such conduct in terms of treason or the like in order to emphasise the particularly reprehensible character of the conduct. Our provisional view is that conduct of this kind, even though it would necessarily involve the commission of other serious offences, needs to be a separate offence, and that there should be a specific offence applicable in peacetime to penalise conduct aimed at the overthrow, or supplanting, by force, of constitutional government."

The American Brown Commission (1971), on the other hand, would limit the offence of treason to a U.S. national who assists an enemy when the U.S. is engaged in an international war.[110] The proposed Code has a separate section[111] entitled "Armed Insurrection" which divides the offence into three subsections with different penalties for each: (1) engaging in armed insurrection; (2) leading armed insurrection (involving 100 or more persons); and (3) advocating armed insurrection. The section is worth very careful consideration

for Canada because it brings together in one new section some aspects of the present law of treason with the really serious parts of sedition, thus permitting the elimination of the troublesome offence of sedition.

There is no separate offence, whether treason or otherwise, dealing with illegal secession.[112] Assuming that secession was not effected legally, any resistance to attempts to reassert authority would clearly, under the 1927 Code, have been considered levying war against Canada. Is the levying war subsection (46(1)(b)) still applicable in the light of the enactment of s. 46(2)(a) (using force to overthrow the government of Canada or a province)? The courts would surely hold that both sections are available as there would seem to have been no intent to cut down on the scope of other treason provisions by the enactment of a more specific subsection. Would the conduct, in fact, be in violation of s. 46(2)(a)? Would it amount to overthrowing the government of the province if the government of the province were leading the secession? Would it amount to overthrowing the government of Canada when it challenged only the application of Federal power? No doubt Canadian courts would hold that illegal secession came within both sections 46(1)(b) and 46(2)(a), but it would be better if Canada had a section comparable to the proposed U.S. provision in S. 1437 passed by the Senate in January 1978 which makes it an offence to engage in armed rebellion or armed insurrection "with intent to ... sever a state's relationship with the United States."[113]

If the secession succeeds and the new state is recognized internationally[114] there can be no treason in the eyes of international law. But whether the courts of the state from which the new state seceded would see it in the same way is a different matter. They probably would not look behind the executive's declaration that the new state should not be treated as a sovereign power.

If the secession does not succeed then treason charges are possible, although, as in the U.S. following the Civil War, they may not be brought.[115]

F. *Obedience to a 'de facto' Government*

Section 15 of the Code provides that

> "No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs."

A similar section was first enacted in 1495 to prevent treason trials for the supporters of Henry VII in the event that the Yorkists should force a restoration.[116] The law provided that no one would be guilty of treason for obedience to "the king and sovereign lord of this land for the time being." Oliver Cromwell's supporters are said to have urged him to become King in order to take advantage of this law.[117] He did not do so, and after the restoration Charles II held treason trials for the Twenty-Nine Regicides who took part in the judgment and sentencing of his father, Charles I.[118] It may be that the 1495 statute would not have applied to spare the Regicides even if Cromwell had become king.

Section 15 has been criticized by Professor Leigh as "vague and, arguably, objectionable in principle" because it could apply to an occupying power and could even exempt someone from punishment for war crimes.[119]

G. *Conclusion*

Our treason laws were restructured and a number of changes made in the 1953-54 Revision of the Code. At that time some of the more blatant anomalies were removed, such as the treasonous offence of violating the Royal consort or harming the eldest son and heir apparent. Nevertheless, the sections should again be examined to eliminate some of the historical and other anomalies which are still applicable to treason. In particular, the use of an objective mental state in s. 46(2)(b) should be eliminated. Moreover, it would be sensible to restructure the Code to group the espionage provisions of the Official Secrets Act with the relevant Code sections and to include insurrection along with its advocacy (i.e., sedition) in one section as the U.S. Proposed Federal Code has recommended.

II. Sedition

There is, in fact, no such offence as sedition. As Stephen stated,[1] "As for sedition itself I do not think that any such offence is known to English law." The word "sedition" has come to be used, however, as a convenient way of describing three separate offences now set out in s. 62 of the Code: (a) speaking "seditious words"; (b) publishing "a seditious libel"; and (c) being a party to a "seditious conspiracy". For all three offences there must be "a seditious intention", but the words "seditious intention" are not defined in the Code. When the sections were first introduced into the Criminal Code by the draft Criminal Code Bill of 1891 there was, in fact, a definition; not surprisingly, virtually the very one that the English Draft Code of 1878 had used and which the English Commissioners had borrowed from Stephen's *Digest*. The English Commissioners had stated that it appeared "to state accurately the existing law."[2] This definition read as follows:[3]

> "A seditious intention is an intention — To bring into hatred or contempt, or to excite disaffection against, the person of Her Majesty, or the Government and Constitution of the United Kingdom or any part of it, or of Canada or any Province thereof, or either House of Parliament of the United Kingdom, or of Canada or any Legislature, or the administration of justice; or To excite Her Majesty's subjects to attempt to procure, otherwise than by lawful means, the alteration of any matter in the State; or To raise discontent or disaffection amongst Her Majesty's subjects; or To promote feelings of ill-will and hostility between different classes of such subjects."

William Mulock (later the Chief Justice of Ontario) objected to the provision stating,[4] "I will oppose anything which will prevent a man from expressing his views in regard to any matter against the state or in the state." The Minister of Justice, Sir John Thompson, later dropped the definition, stating,[5] "we shall make no definition of seditious intention, but will simply go on to say what shall not be seditious, leaving the definition of sedition to common law."

A. *Canadian Cases*

The sections could be — and were — misused because of their very vagueness. As Kellock J. stated in 1950 in the *Boucher* case[6]: "no crime has been left in such vagueness of definition as that with which we are here concerned, and its legal meaning has changed with the years." The *Boucher* case gave to sedition a concreteness that was not there before, but until this is built into the statutory law a measure of vagueness will continue. First, let us look at some of the Canadian cases prior to *Boucher*.

During the First World War there were six reported sedition cases, five of them ending in convictions.[7] In one of those that ended in conviction the accused had simply said "You are slaves, you have to do what King George and Kitchener say"[8] and in another, "Every one who gives to the Red Cross is crazy. If no one would give to the Red Cross the war would stop."[9] These cases illustrate how relatively insignificant the conduct prosecuted was. And there may have been many more uses of sedition in this way if Stuart J. had not said in an Alberta case:[10] "The Courts should not, unless in cases of gravity and danger, be asked to spend their time scrutinizing with undue particularity the foolish talk of men in bar rooms and shops." While these cases may have been, as one writer has stated[11], "a product of the frenzied atmosphere of the war years", the cases following the war were a result of the hysteria of the "red scare".[12]

It was this fear of communism that caused Parliament (in 1919) to raise the penalty for sedition from 2 years to 20 years.[13] The penalty has over the years been subject to wild fluctuations, perhaps an indication that the objectives of the offence have not been well defined. The 20 year penalty was reduced back to 2 years in 1930,[14] raised to 7 years in 1951[15] and to 14 years in the 1953-54 revision.[16]

The prosecutions following the Winnipeg General Strike, unlike the wartime prosecutions, involved very serious conduct. The Chief Justice of Manitoba, Perdue, described how he saw the intention of the strike leaders in the *Russell* case:[17] "revolution, the overthrow of the existing form of government in Canada and the introduction of a form of Socialistic or Soviet rule in its place. This was to be accomplished by general strikes, force and terror and, if necessary, by bloodshed." Of the eight prosecuted under the sedition provisions for their role in the strike, Russell received two years, five were sentenced to one year, one to six months on another charge and one was acquitted.[18] Commentators on the case are divided on whether the charges of sedition were justified.[19]

There were other prosecutions in the twenties and thirties: for example, against a union leader in 1923,[20] a series of prosecutions against the Jehovah's Witnesses,[21] and of course there were prosecutions against members of seditious organizations, a topic which we shall come to later.

In 1950 Boucher, a Jehovah's Witness, was prosecuted for seditious libel. The English Law Commission in its recent Working Paper on sedition described the *Boucher* case as "the most careful analysis which has been given

to the law of sedition in recent years."[22] The pamphlet in question in *Boucher* was entitled "Quebec's Burning Hate for God and Christ and Freedom is the Shame of all Canada." It included a reference to the "French Canadian courts" as being "under priestly thumbs", and ended by stating: "if freedom is exercised by those who disagree with you, you crush freedom by mob rule and gestapo tactics.... Quebec, you have yielded yourself as an obedient servant of religious priests, and you have brought forth bumper crops of evil fruits."[23] The Supreme Court of Canada held (5-4) that there was no evidence on which a properly instructed jury could find that the pamphlet was a seditious libel because a seditious intention requires "an intention to incite to violence or resistance or defiance for the purpose of disturbing constituted authority."[24] Rand J. referred to society's need for the "clash of critical discussion" stating:[25] "Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality." The decision broadens the scope of free speech and thus narrows the definition of sedition. If the law of sedition is to be retained, the important restriction on the law of sedition enunciated in the *Boucher* case should form part of the Code.

The final charges of sedition which will be discussed here are the charges of seditious conspiracy brought on November 5, 1970 — (the War Measures Act had been invoked a few weeks earlier, on October 16th) — against five persons associated with the separatist movement, Lemieux, Gagnon, Vallières, Chartrand and Larue-Langlois.[26] The indictment was quashed by Ouimet J. as being too vague. Three of the accused were again charged with seditious conspiracy and after a six week trial were acquitted. Vallières' trial had been postponed because of his ill health; he later pleaded guilty to a lesser charge and received a suspended sentence.[27]

In England sedition has been used very sparingly. The English Law Commission states that in the last 15 years there has been only one instance of a prosecution for sedition in the U.K. and in that case there were other offences of which the defendants were convicted.[28]

We turn now to an examination of the history of sedition to see how the offence developed over the centuries, which may assist us in assessing whether it properly belongs in the Code.

B. *History of Sedition*

Unlike treason, which can easily be traced to the Treason Act of 1351, the origins of the offences relating to sedition are obscure. They are obscure because they come from a number of divergent sources that intersect at different points in history; these sources are the law of treason, the mediaeval offence of "scandalum magnatum", and the offences of criminal libel and conspiracy. Each of these will be examined in turn.[29]

There is considerable overlap between the offences of sedition and treason. Because treason requires only intent to commit treason and an "overt act", seditious statements or a seditious conspiracy will often be enough to constitute treason. The word sedition comes from the classical Latin word "seditio", meaning uprising or insurrection.[30] In the middle ages sedition was the word used to describe treasonous conduct. Furthermore, there were many cases in which what is now thought of as sedition was then charged as treason.[31]

Towards the end of the 16th century, however, doubts arose as to whether words alone could amount to treason. There was no such doubt in earlier periods.[32] It may be that this doubt was manufactured in the early part of the 17th century in order to give the Star Chamber authority to try what might otherwise be cases of treason and would therefore have to be tried by a jury in the ordinary courts — and juries do not always convict. The Star Chamber did not have authority to try cases of treason[33] *per se*. The absence of a jury in the Star Chamber was, of course, an advantage that the government wished to have. This was the age of the new printing presses and the government, through the Star Chamber, wanted to have effective control of them.[34] As Holdsworth stated,[35] "the Star Chamber, from an early date, assumed jurisdiction over all cases in which its rules as to the manner of publishing, and as to the matter published were infringed." Was it just coincidence that it was Coke, who as Attorney-General had brought the first charge before the Star Chamber (in 1606) of what later became seditious libel,[36] who expressed doubts on whether words alone could amount to treason?[37]

The Star Chamber did not manufacture the new offence out of whole cloth. There were much earlier precedents with respect to defaming public figures that went under the name "scandalum magnatum".[38] So it was an easy jump from these early cases to making it an offence to defame the deceased Archbishop of Canterbury in the 1606 case of *Libellis Famosis*,[39] said by many writers[40] to be the origin of the law of sedition.[41]

It was an even easier jump from defaming a deceased public figure to defaming the government itself. So we find, for example, Chief Justice Holt a century later in 1704 stating[42] "nothing can be worse to any government than to endeavour to produce animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe without it is punished." Lord Mansfield towards the end of the 18th century obviously shared his predecessor Holt's concern for the safety of the government; in the well-known *Shipley* case[43] he attempted to keep this important political matter out of the hands of the jury[44] by holding that it was for the judge to determine if the words amounted to a seditious libel and for the jury simply to determine if the words were uttered.

Over the next period one sees a form of schizophrenia concerning the definition of sedition, which reflects the tension in the English society of the day between the conservatives who saw the government as supreme and above criticism[45] and the radicals who saw the members of the government as delegates of the people and subject to public censure.[46] The former group favoured a

broad definition of sedition, while the latter had no place for an offence of sedition at all. "Much legislation of the period 1797 to 1820" wrote Ivor Jennings[47] "was deliberately aimed at the suppression of democratic ideas," but The Reform Act of 1832, extending the franchise, tipped the balance in favour of democratic principles. Although the struggle for parliamentary reform was far from over, as a practical matter the offence of seditious libel was thereafter effectively ended in England.[48]

But, to follow the story in a slightly different direction, the Reform Act did not have the same effect upon the offence of criminal libel dealing with insulting living persons (not groups). So "scandalum magnatum" lived on.[49] Criminal libel, now found in sections 261 to 280 of the Canadian Criminal Code, is a very curious offence. Truth alone is not a defence: publication must also be for the public benefit.[50] Moreover, it only applies to published matter and to speeches that are read, not to those that are given extemporaneously. The sections should surely be eliminated from the Code and the civil law of defamation be made the only remedy. At the very least, truth, whether or not there is public benefit, should be a defence.[51] Moreover, it is arguable that the offence should require an intent to breach the peace.[52] Defaming groups is now covered by the Hate Propaganda provisions of the Code, ss. 281.1 — 281.3, which make it an offence for anyone who "advocates or promotes genocide" or who "by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace."

Stephen tried for a compromise in his definition of sedition by reflecting both the conservative and the radical views.[53] In favour of democratic principles, he put in his *Digest* a section, adopted by the English Commissioners and our 1892 Code, which provided that no one should be deemed to have a seditious intention by reason only that he "in good faith" criticized the government or attempted to procure "by lawful means" the alteration of any matter of government. This section was eliminated from the Canadian Criminal Code in the heat of the Winnipeg General Strike in 1919, but was restored in 1930.[54]

The story is not over, however, because just before the time of the demise of seditious libel one sees the development of the offence of seditious conspiracy. The Star Chamber had developed the offence of conspiracy in the early 1600s,[55] but for the next 150 years it was not needed for seditious offences since seditious libel was so all-encompassing. However, Fox's Libel Act in 1792[56] gave juries considerable independence and so prosecutors started using and courts upheld the concept of seditious conspiracy. The first case in which it was used appears to have been in 1795.[57] The Government wanted to ensure that a revolution did not take place in England as had recently happened in France. And so, aided by a number of statutes passed at the time, the Government bore down hard on anything that had the appearance of being a seditious conspiracy.[58] It is interesting to note that there was a similar reaction to the French Revolution in the United States[59] where the Alien and Sedition Acts of 1798 made it illegal to utter any words "with intent to defame ... Congress, or

the ... President, or to bring them ... into contempt or disrepute; or to excite against them ... the hatred of the good people of the United States."[60]

Seditious conspiracy was used in England throughout the 19th century. It was used after the Chartist disturbance at Monmouth in 1839[61] and against the Irish activists, O'Connell in 1844 and Parnell in 1880.[62] And as has already been discussed, it was used in Canada in a number of cases.[63]

So we have now seen how sedition was drawn in part from treason and in part from criminal libel and the "scandalum magnatum" cases, and finally how the offence of conspiracy was brought in.

There is one more part of the story to tell, the history of legislation dealing with seditious organizations, before an assessment is made of the offence of sedition.

C. *Seditious Organizations*

Canada, England and the United States have at various times all declared certain organizations to be illegal and membership in them a crime. The Unlawful Oaths and Suppression of Secret Societies Acts in England at the end of the 18th century[64] can be looked upon as early examples of this form of legislation. The preamble to the 1799 Act reads as follows:[65]

> "Whereas a traitorous conspiracy has long been carried on in conjunction with the persons from time to time exercising the powers of government in France to overturn the laws, constitution, and government, and every existing establishment, civil and ecclesiastical, in Great Britain and Ireland, and to dissolve the connection between the two kingdoms so necessary to the security and prosperity of both...."

Provisions in our Code relating to seditious oaths[66] were not removed until the 1953-54 Revision.

The key Canadian provision was the controversial section 98, first enacted in 1919.[67] The section made it an offence to "become and continue to be a member" of an unlawful association.[68] An unlawful association was an association[69]

> "one of whose purposes is to bring about any governmental, industrial or economic change within Canada by use of force, violence or physical injury to person or property, or by threats of such injury, or which teaches, advocates, advises or defends the use of force, violence, terrorism, or physical injury to person or property, or threats of such injury, in order to accomplish such change, or for any other purpose ...."

There was a rebuttable presumption that a person was a member of an unlawful association if he had attended meetings of the association, had spoken publicly in its advocacy, or had distributed its literature through the mails.[70] And there were wide rights of search: a search warrant was to be issued by a Justice of the Peace if there was "reasonable ground for suspecting" — not "believing" as in the normal powers of search — that an offence had been or was about to be committed.[71]

The section had its origins in a similar regulation (P.C. 2384) passed by the Borden Cabinet under the War Measures Act on September 28, 1918. This provision, which was limited to cases "while Canada is engaged in War", was revoked on April 2, 1919. There is only one reported case under the regulation, although it is likely that there were others that went unreported.[72] The regulation may well have been inspired by a comparable American Bill which had cleared the Senate, but did not make it through the House.[73] The issuing of the regulation followed a Report commissioned by the Prime Minister which had expressed great concern about foreign agitators said to be partly financed by German funds. The solution recommended by the writer of the report, but not adopted by the Government, was that the provision for the registration of enemy aliens be extended to cover Russians, Ukrainians and Finns.[74]

Shortly after the end of the War a House of Commons Committee was set up to decide what should be done with the sedition sections of the Code. The Solicitor-General had stated in the House on May 1, 1919 that it was doubtful if the existing provisions were adequate.[75] On June 10, the Committee recommended that legislation similar to P.C. 2384 be enacted in the Code. Later that month section 98 was introduced in the House, receiving Royal Assent in early July.[76] A much debated question is whether the Winnipeg General Strike was responsible for the legislation.[77] The Solicitor-General, Hugh Guthrie, stated on June 10, 1919, when presenting the Committee recommendations, that they were not "inspired by nor are they the result of the Winnipeg strike."[78] It is true that the Parliamentary Committee had been established before the strike started and the legislation was part of the general reaction throughout North America to the "red menace",[79] but there may have been a closer connection than the Solicitor-General suggests. After all, the Winnipeg General Strike was then the most successful general strike in North American history.[80] The day before the Parliamentary Report was brought in, 240 members of the regular city police force were fired for refusing to sign loyalty oaths (to the city) and on the very day of the Report, the first major incident of violence took place when a serious clash occurred between the strikers and the "specials" who had replaced the Winnipeg police force.[81] At an earlier point the Committee was apparently leaning the other way.[82]

A few years after the legislation was enacted, the Commons tried to repeal it, but the Senate blocked its repeal and this sequence was repeated in each of the years 1926, 1927, 1928, 1929 and 1930. The Liberals were re-elected in 1935 and this time their repeal of section 98 was accepted by the Senate.[83]

The Senate may not have objected to its repeal because a further subsection was added to the sedition section which provided that "every one shall be presumed to have a seditious intention who (a) teaches or advocates, or (b) publishes or circulates any writing that advocates, the use, without the authority of law, of force as a means of accomplishing a governmental change within Canada."[84] In some respects this provision is stronger than section 98 because most active members of what would have been an illegal association would now be caught as persons who circulated "any writing that advocates the use ... of force as a means of accomplishing a governmental change" and,

unlike section 98, this is a conclusive and not a rebuttable presumption. But, at least it did not make mere membership, however casual or innocent, a crime. It should also be noted that this subsection operates in spite of the *Boucher* case[85] which, it will be recalled, required an intention to incite to violence. (Perhaps as a consequence of the repeal of section 98, Quebec enacted the Communistic Propaganda Act of 1937 making it illegal to circulate any document tending to propagate Communism, but this was later held *ultra vires* provincial law in *Switzman* v. *Elbling*.[86])

There were apparently only three reported prosecutions under section 98,[87] the most important being the conviction in 1934 of Tim Buck, the leader of the Communist Party of Canada. Buck and six others were sentenced to five years and one other received a three year sentence.[88]

The concept of the illegal organization reappeared in the Defence of Canada Regulations passed under the War Measures Act during the Second World War and a large number of organizations, including such groups as the Jehovah's Witnesses,[89] were declared to be illegal organizations.

Its next reappearance was in October 1970 in the regulations issued under the War Measures Act,[90] following the kidnapping by the F.L.Q. of James Cross, the English diplomat, and Pierre Laporte, the Quebec Cabinet Minister. The regulations made it an offence to belong to the F.L.Q. or any group of persons or association advocating the use of force or the commission of crime to accomplish any governmental change in Canada.[91] These regulations were later replaced by a temporary statute, the Public Order (Temporary Measures) Act, 1971,[92] which was specifically directed at the F.L.Q., stating that the F.L.Q. "or any group of persons or association that advocates the use of force or the commission of crime as a means of or as an aid in accomplishing the same or substantially the same governmental change within Canada with respect to the Province of Quebec or its relationship to Canada as that advocated by the said Le Front de Libération du Québec, is declared to be an unlawful association." The War Measures Act will be discussed in detail in a later section. One objectionable feature of the way the regulations were drafted and operated was that the arrests for membership were made before anyone outside the government knew about the invocation of the War Measures Act or the regulations. Thus there was no opportunity, as there was in the Second World War, for members to resign before they were arrested or charged.[93]

There are now in England emergency provisions declaring the I.R.A. an illegal organization;[94] this legislation will be analyzed in a later section.

In the United States the controversial Alien Registration Act of 1940,[95] better known as the Smith Act, also involved prosecuting persons for membership in an illegal organization.[96] The Act both outlawed certain organizations and required the registration of members. It is still on the books, although its scope has been limited by a series of important constitutional cases. The *Dennis* case in 1951[97] held that the Act was constitutional. Chief Justice Vinson stated that Holmes' "clear and present danger" test[98] did not mean

that the government had to wait "until the *putsch* is about to be executed, the plans have been laid and the signal is awaited."[99] In 1957, however, in the *Yates* case[100] the Supreme Court erected safeguards in the Act without reversing *Dennis*. Harlan J. stated "those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something."[101] Then in *Noto* in 1961, to complete this capsule history, Harlan J. stated:[102]

> "There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching, and to justify the inference that such a call to violence may fairly be imputed to the Party as a whole, and not merely to some narrow segment of it."

As Belknap has written, "These words made future membership prosecutions, while theoretically possible, practically very difficult."[103] Belknap concludes his book on the Smith Act by stating:[104] "Although the Smith Act is still on the Statute books, because of the *Yates* and *Noto* decisions there is little likelihood that the government will again employ its conspiracy, advocacy, or membership provisions against a dissident organization."

The Brown Commission in 1971 drafted a section which "incorporates judicially-expressed constitutional requirements."[105] This section makes it an offence to be an "active member" of an association which "advocates the desirability or necessity of armed insurrection under circumstances in which there is substantial likelihood his advocacy will imminently produce" an armed insurrection.

D. *Conclusion*

At a minimum, the important limitation on the offence of sedition enunciated by the Supreme Court of Canada in *Boucher*[106] requiring an intention to incite to violence should form part of the Code. Without such a limitation built into the Code there is a danger that the police and others will give the offence for purposes of investigation, surveillance and search, if not for prosecution, a wider meaning than is presently the law. But if *Boucher* is the law then there is really no need for an offence of sedition because the *Boucher* test requires "an intention to incite to violence or resistance or defiance for the purpose of disturbing constituted authority"[107] and therefore the English Law Commission is surely correct in stating:[108]

> "In order to satisfy such a test it would, therefore, have to be shown that the defendant had incited or conspired to commit either offences against the person, or offences against property or urged others to riot or to assemble unlawfully. He would, therefore, be guilty, depending on the circumstances, of incitement or conspiracy to commit the appropriate offence or offences."

Therefore, as the English Law Commission concluded[109] "there is no need for an offence of sedition in the criminal code."

The advocacy of revolution could be dealt with as incitement to treason, or preferably, as discussed in the treason section, as part of an offence relating to armed insurrection.[110] Subsection 4 of section 60, which presumes that a person has a seditious intention if he circulates any writing that advocates armed insurrection, could be dropped from the Code or could become a presumption which the accused would be entitled to rebut.

III. Other Criminal Offences

There are a large number of other Criminal Code offences relating to national security, such as intimidating Parliament (s. 51), uttering a forged passport (s. 58), hijacking aircraft (ss. 76.1 - 76.3) and unlawfully possessing explosives (ss. 77-80), which could be dealt with, but largely for reasons of time and space only three further important categories will be discussed in any detail here: sabotage; unlawful assembly and riot; and finally, inciting mutiny and unlawful drilling.

A. *Sabotage*

The offence of sabotage[1] was first introduced into the Criminal Code in 1951.[2] The section was revised in the 1953-54 Code; not only were subsections inserted to make it clear that legitimate trade union activity could not be considered sabotage,[3] but the section was changed from the former language which made it an offence to do "a prohibited act for a purpose prejudicial to the safety or interests of Canada" to doing an act "for a purpose prejudicial to the *safety, security or defence* of Canada." The new words, which have been italicized, narrow the scope of the section. This change is in line with the narrowing of the treason section relating to disclosure of military or scientific information, introduced at the same time, which, it will be recalled had substituted the words "safety or defence of Canada" for the proposed words "safety or interests of Canada."[4]

Sabotage will also be discussed under the Official Secrets Act because that Act can be and, in fact, has been used in sabotage cases.[5]

B. *Riot and Unlawful Assembly*

These two offences are dealt with together because an unlawful assembly can lead to a riot. Parliament and the courts have always tried to maintain control over the activities of crowds.[6] This was not just to ensure that the group did not get out of hand, but also so that citizens would not have to live in fear of violence. So, one finds, for example, in the 1892 Criminal Code the following sections setting out the necessary number of persons for certain offences: 2 persons for an "affray";[7] 3 for an "unlawful assembly";[8] and 12 for a "riot".[9] "Affray", which historically emphasized the causing of fear, and not simply the fighting itself[10], was replaced in the 1953-54 Criminal Code by the offence of "Causing a Disturbance"[11] but the offences of unlawful assembly and riot are still in the Code.

An Unlawful Assembly is defined in the Code[12] as "an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when they are assembled as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds, that they (a) will disturb the peace tumultuously, or (b) will by that assembly needlessly and without reasonable cause provoke other persons to disturb the peace tumultuously."

The section comes from the English Draft Code of 1878.[13] Its origin can be traced back to the 15th century when its purpose was to prevent persons from travelling at the head of bands of armed retainers.[14] Thus unlawful assemblies were of concern, even where they were not incipient riots.[15]

It is an odd offence since it makes persons punishable by up to 6 months imprisonment[16] who have no intent to "disturb the peace" or even the intent "to cause persons in the neighbourhood" so to fear. Surely intent (purpose or possibly knowledge) on the part of the participants should be required.[17] It is possible that our courts will so interpret the section, but it would be better if it were clear in the legislation.

The predecessor of our offence of riot is the Riot Act[18] which was enacted in 1714 to prevent anticipated disorders by those who were opposed to the elevation of the Hanoverians to the English throne. (There had been earlier statutes dealing with riot,[19] but these had expired by the 17th century when riot was dealt with first by the Star Chamber and later by a liberal construction of the treason statute.)[20] Throughout the eighteenth, nineteenth, and even in the twentieth century, the riot was a surprisingly prevalent form of protest. I say surprisingly because orthodox history stresses the peaceful evolution of British institutions.[21] However necessary the Act may have been in earlier periods, particularly when there were no police forces, it is surely unnecessary in its present form today. A riot is defined simply as "an unlawful assembly that has begun to disturb the peace tumultuously."[22] The penalty for this is up to 2 years imprisonment. It is the riot proclamation aspects that are anomalous today.

If there is a riot, a justice, mayor or sheriff (but not a peace officer, although he can be the deputy of one of those authorized) can approach "as near as safely he may do" and read "in a loud voice" the following proclamation:[23]

> "Her Majesty the Queen charges and commands all persons being assembled immediately to disperse and peaceably to depart to their habitations or to their lawful business upon the pain of being guilty of an offence for which, upon conviction, they may be sentenced to imprisonment for life. GOD SAVE THE QUEEN."

This is popularly known as "reading the Riot Act", but in Canada really should be called "reading the Riot section", as there is no separate Riot Act. It has been used in Canada on a number of occasions, for example, during the Winnipeg General Strike[24] and in connection with the marches by the unemployed during the Depression.

If the crowd does not disperse within 30 minutes (one was given 60 minutes in the original legislation) each person is liable, as the proclamation states, to imprisonment for life.[25] Disobeying the proposed comparable American provision[26] will lead to a maximum penalty of only a fine. Something is obviously wrong with one of the provisions! The Brown Commission proposal permits a "superior police official" to give the order to disperse[27] but he could only issue "reasonable orders". It is not clear from our section whether a riot actually has to be in progress before the proclamation can be read and enforced because the sections says "if he is satisfied that a riot is in progress", but it is likely that a court would hold that he could not be so satisfied if no riot was actually taking place.

Our section requires everyone to disperse — participants, bystanders and the press. Surely the section should enable distinctions to be made by the person issuing the order. Indeed, there is much to be said for entirely excluding newsmen from the proclamation in order to discourage, as Professor Louis Schwartz, the Research Director of the Brown Commission, has argued, "the not infrequent efforts of riot control forces to operate free of public surveillance."[28]

The Riot Act was repealed in England in 1967[29] (leaving the common law offence of riot) and surely the provisions in their present form should be eliminated in Canada and more reasonable sections outlining the powers of the police should be substituted.[30]

The foregoing offences define to a certain extent the limits of freedom of speech and association. There are, however, many other laws, regulations and practices which are of great importance in limiting public protest and therefore in defining the tolerance for dissent within our society. The right to march through the city streets is a prime example.[31] This was recently the subject of a Supreme Court of Canada decision upholding a Montreal city by-law regulating and in some cases prohibiting such marches[32] and, in contrast, a United States Supreme Court decision permitting the Nazi party to march through the streets of Skokie, Illinois.[33]

However important this topic is — and Alan Borovoy, the General Counsel to the Canadian Civil Liberties Association has written[34] that "the dominating civil liberties issue of the next 50 years will concern the threshold of our tolerance for disruption" — it will not be discussed in this paper because it is not central to the national security issues being discussed here. (The Civil Liberties Associations would not, of course, claim it was, for fear that all dissenting groups would be the proper subject of concern of the Security Service.)

C. *Inciting Mutiny and Unlawful Drilling*

These offences are dealt with together because they are designed to ensure that there is no police force or army to compete with the State's and that the State's police and army remain loyal to the government. Let us look at unlawful drilling first.

Section 71 of the Code allows the Cabinet to make orders (general or specific) prohibiting persons from training or drilling or practising military exercises. No such order appears ever to have been made under the section. The section, which was in the 1892 Code,[35] came from the English Draft Code of 1878, which was in turn based on the English Unlawful Drilling Act of 1819.[36]

A similar prohibition against private armies was included in the Brown Commission proposals.[37] Somewhat surprisingly, there is no such prohibition in existing American law, although there is a statute relating to registration.[38] Perhaps it was previously mistakenly thought that the right to bear arms carried with it the right to create a private army. There is, in fact, no absolute right to bear arms in the U.S.[39] The proposed U.S. statute limits its application to paramilitary training of 10 or more persons and provides a greater penalty if 100 or more persons are involved.[40]

In England, the 1936 Public Order Act made it even more difficult for private armies to be established. It made it illegal to wear, without official consent, in any public place or at any public meeting a "uniform signifying his association with any political organization or with the promotion of any political object."[41] "In Great Britain", wrote David Williams,[42] "the popularity of uniforms was growing rapidly, so much so that there were Blackshirts, Blueshirts, Greyshirts, Redshirts, Greenshirts, Brownshirts and Whiteshirts." There was no similar legislation in Canada.

Moreover, the 1936 U.K. Public Order legislation[43] made it an offence to take a leading part in associations organized, trained or equipped for the "purpose of enabling them to be employed in usurping the functions of the police or of the armed forces" or for the "purpose of enabling them to be employed for the use or display of physical force in promoting any political object." Again, there has been no comparable legislation in Canada. Let us now look at the provisions designed to ensure that the army and the police remain loyal to the government.

A number of sections of the Canadian Criminal Code are designed to ensure that the army and the R.C.M.P. remain loyal to the Crown. Section 53 of the Code makes it an offence punishable with up to 14 years imprisonment for anyone to attempt "for a traitorous or mutinous purpose, to seduce a member of the Canadian Forces from his duty and allegiance to Her Majesty." Like most of the other sections we have been looking at, a comparable section was included in the 1892 Code and the 1878 English Draft Code.[44] The section was first enacted in England in 1797, in reaction to the French Revolution.[45] Although the Annual Mutiny Acts throughout the 18th century naturally carried offences relating to mutiny, there was no such offence with respect to actions by civilians.[46]

There have been a number of important prosecutions in England over the years. Union leaders were convicted in 1912;[47] and in 1925 twelve leading Communists were convicted of conspiracy to incite breaches of the 1797 Incitement to Mutiny Act.[48] Another prosecution in 1924[49] for a breach of the Act was withdrawn, an action which led to the defeat of the Government.

The English legislation was broadened in 1934 by the Incitement to Disaffection Act[50] to make it an offence to seduce a member of the armed forces from his "duty *or* allegiance." The 1797 legislation had stated "duty *and* allegiance", as our section 53 presently does, and the government obviously wanted to widen the scope for prosecutions. Moreover, the 1797 Act, like ours, required that the seduction be "for a traitorous or mutinous purpose" and no such requirement was in the 1934 Legislation.[51] There was considerable opposition to the Act; it was even attacked by Sir William Holdsworth.[52] The suspicion that the Act would be used to crush legitimate dissent resulted in the search warrant section being restricted to a High Court Judge.[53] The English Law Commission in its recent Working Paper has provisionally suggested that the 1797 Act be dropped and that the 1934 Act be retained but redrafted so that, *inter alia*, it be made "clear that the offence requires an intention to seduce a member of the forces from his allegiance."[54]

We have already looked at section 53 of the Canadian Code, the inciting to mutiny section. There is another section, however, relating to the armed forces (s. 63), which was first enacted in 1951[55] and which has much of the force of the 1934 English legislation, although the language used is different. The section states that everyone who wilfully "advises ... or in any manner causes insubordination ... or refusal of duty by a member of a force" is liable to imprisonment for five years.[56]

Section 63, as originally enacted in 1951, included the R.C.M.P., but this was deleted in the 1953-54 Revision because, as was said in the Senate Committee debates: "We should ... very carefully distinguish between military forces and the Royal Canadian Mounted Police, which is not a military force, and should be kept a civilian force."[57]

No comparable provision relating to the police was, however, placed in the Code. The only provision in the Code relates to counselling a member of the R.C.M.P. to desert or go A.W.O.L. (s.57), and there is nothing at all relating to provincial or municipal forces. In contrast, there is much stronger legislation in England, which was first enacted in the Police Act of 1919 (now superseded by section 53(1) of the U.K. Police Act 1964)[58] following police strikes in 1918 and 1919.[59] The English legislation now makes it an offence to attempt to cause "disaffection amongst the members of any police force" or to try to "induce ... any member of a police force to withhold his services or to commit breaches of discipline." It should be noted that the English police remained loyal during the 1926 General Strike,[60] but, as we have earlier seen, the Winnipeg police did not during the Winnipeg General Strike in 1919. Whether legislation would have affected the police in either case is a matter for speculation.

IV. The Official Secrets Act

The 1969 Report of the Royal Commission on Security (the Mackenzie Report) accurately described the Act as "an unwieldy statute, couched in very broad and ambiguous language"[1] and concluded that "consideration should be given to a complete revision of the Canadian Official Secrets Act."[2] The earlier Taschereau/Kellock Royal Commission, set up in 1946 following the

Gouzenko revelations, had simply recommended that the Act be "studied in the light of the information contained" in the Report and the proceedings, "and, if it is thought advisable, that it be amended to provide additional safeguards."[3] As a result of this Report a number of relatively minor changes were made in 1950.[4] The wiretapping section, section 16, was added in 1973,[5] but the Act has not yet undergone the "complete revision" recommended by the Mackenzie Commission. It still uses the concepts and in many sections the language of the English 1911[6] and 1920 Official Secrets Acts.[7]

The Act is complicated because it deals with two separate, although sometimes related, concepts, espionage (section 3) and leakage (i.e., the improper disclosure of government information) (section 4). To add to the complication, the comparable sections in the English legislation are numbered differently: their espionage section is section 1 and their leakage section is section 2.

Most of the concern over the Act in recent years has related to the leakage provisions. The recent prosecutions against Peter Treu[8] and the Toronto Sun[9] involved the leakage sections. In England, concern over the Act also relates to the leakage provisions. This led to extensive hearings and a Report in 1972 by a Departmental Committee under the Chairmanship of Lord Franks.[10] This Report recommended a number of changes in the Act and in July 1978 the British Government issued a White Paper on the subject.[11]

"Freedom of Information" laws are connected with the "leakage" provisions, although they shift the focus from the prohibition against disclosure in the leakage provisions of the Official Secrets Act to a positive obligation on request to disclose, subject to specific exemptions. The parts of the Act relating to the release of government information will be dealt with in detail in a later Part of this paper, Government Information. In this section the espionage provision will be examined; however, in relating the history of the Act and in dealing with some of the procedures, it is difficult to separate the leakage from the espionage sections.

The overall conclusion to this study of the Canadian Official Secrets Act is that the espionage provisions of the Act should be redrafted and placed where they properly belong, that is, in the Criminal Code, and that the leakage provisions should be in a separate Act dealing with access to and control of government information, possibly with the criminal penalties also being in the Code. The Official Secrets Act could then be repealed.

A. *History of the Official Secrets Act*

The first Official Secrets Act was passed in England in 1889[12] and was enacted almost verbatim in Canada in 1890.[13] The Canadian Act was transferred to the first Canadian Criminal Code two years later, in 1892.[14] These provisions remained in the Criminal Code until their repeal in 1939.

In the decade before the 1889 Act there were a number of incidents that caused the British government considerable concern about the improper use of secret government information.[15] For example, in 1878 a disgruntled clerk by the name of Marvin divulged to a newspaper for compensation a secret Anglo-

Russian treaty concerning the Congress of Berlin; he was charged with stealing the paper upon which the treaty was written, but because he had only memorized the treaty the prosecution was unsuccessful.[16] Another government employee, Terry, had in 1887, escaped a conviction for selling, possibly to a foreign power, tracings of warships.[17] This latter incident led the First Lord of the Admiralty to make the obvious point in the House of Commons that "The law at present is not, in my judgment, in a satisfactory state so far as it bears upon offences of this kind."[18] Later he stated that the Government intended "to introduce a Bill for the purpose of enabling more stringent punishment to be given for such offences ...."[19] When the 1889 Bill was introduced (the first draft of the Bill was entitled the "Breach of Official Trust Bill")[20] the Attorney-General gave the following explanation of the legislation:[21]

> "I wish to say just a word or two with regard to this Bill. It has been prepared under the direction of the Secretary of State for War and the First Lord of the Admiralty in order to punish the offence of obtaining information and communicating it against the interests of the State. The Bill is an exceedingly simple one and I beg to move its second reading."

Like many other "exceedingly simple" pieces of legislation this has turned out to be exceedingly complex.

As the First World War approached there was concern that the espionage parts of the Act did not go far enough. The Act did not prevent German agents from holidaying in England and photographing harbours and other strategic, although not technically "prohibited", areas.[22] Moreover, it was thought to be too difficult to prove under the 1889 Act that the accused possessed the information with the intention of communicating it to a foreign State or to any agent of a foreign State. (Section 1(3)). It was this offence which carried the possibility of life imprisonment, whereas other offences resulted in only a maximum one year penalty.[23] In 1909 a Sub-committee of the Committee of Imperial Defence recommended that the Act be changed[24] and in 1911 at the time of the Agadir incident (a German gunboat had entered Agadir harbour in Morocco, thereby threatening French, and consequently, British interests)[25] a new Act was introduced with very little debate.[26] It created a number of presumptions in the Crown's favour relating to assisting a foreign state, and also made it an offence, with a three year *minimum* penalty, to obtain or communicate "any ... information which ... might be ... useful to an enemy." The latter provisions prevented Germans from openly obtaining strategic information. Although the Act used the word "enemy" it was later interpreted as including a "potential enemy."[27] The quick passage and absence of Parliamentary debate did not mean that the Government had not been considering the Act for some time. The Franks Committee stated: "The House of Commons took half an hour to pass the 1911 Bill through all its stages, but the long series of official files recording the events leading up to this legislation stretches well back into the 19th century."[28] The Government, while stressing the espionage sections, used the occasion to broaden the anti-leakage section to make those who *received* official information (often the press) also guilty of an offence.[29] It is, in fact, this extension in 1911 to the receiver that has turned out to be the most controversial section of the Act.

The 1911 English Act specified that its provisions applied to the Dominions overseas (section 10(1)). Thus it was part of the law of Canada and appeared the following year in the Statutes of Canada in a list of Imperial Acts that were applicable to Canada.[30]

After the First World War the British Government introduced further changes to the Official Secrets Act, particularly relating to espionage, making permanent certain wartime Defence of the Realm regulations which the government wished to preserve in peacetime. Not only was there the threat of communism made vivid by the Russian Revolution,[31] but there was great concern over the activities of the I.R.A. and the possibility of civil war in Ireland. The main debate on the 1920 legislation took place shortly after Bloody Sunday in Dublin in which I.R.A. terrorists assassinated 15 British intelligence officers.[32] At the time of the introduction of the legislation the streets of London were blockaded.[33]

As the 1920 legislation was going through the British Parliament, Sir Gordon Hewart, the Attorney-General, moved an amendment (section 11(1)(a)) that the Act not apply to a number of the Dominions, including Canada, stating that "It is not being applied to the Dominions or to India because the Dominions and India have under contemplation legislation which goes somewhat further."[34] However, no such legislation was then introduced by the Canadian government.

So until Canada enacted the Official Secrets Act in 1939,[35] we were governed by the 1911 English legislation and the somewhat similar provisions that had been introduced into the Criminal Code in 1892 and had not yet been repealed. The 1939 Canadian legislation combined into one Act the 1911 and 1920 English Acts. The Minister of Justice, Ernest Lapointe, stated in the House of Commons in introducing the legislation on April 12, 1939 that "the purpose of the Bill is to consolidate the two Acts and, by an Act of the Parliament of Canada, make them the law of this country."[36] Some of the differences between the Canadian and English legislation will be dealt with in later sections. The Act (section 15) repealed the sections in the Code and the 1911 English Act "in so far as it is part of the law of Canada." (The Statute of Westminster, 1931, allowed such repeal.) The 1939 Act did not, possibly through inadvertence, repeal the section of the 1927 Code (section 592) requiring the consent of either the Attorney-General of Canada or of the Province before a prosecution could be brought. This section was dropped in the 1953-54 revision of the Code. The 1939 Act only permits the consent of the Attorney-General of Canada. Surprisingly, a charge of conspiracy to breach the Official Secrets Act does not require any consent.[37]

As previously mentioned, several relatively minor changes were made in 1950 and other very minor ones in 1967.[38] Some stylistic changes were made in the 1970 Revision of the statutes.[39] The wiretapping amendment[40] made in 1973, which will be dealt with fully in a later section, completes this brief legislative history of the Statute.

There is nothing in Canada comparable to the "D" notice, or Defence notice, system which operates in England[41] and Australia.[42] "A 'D' notice", to adopt the language of Wade and Phillips,[43] "is a formal letter of warning or request, sent by the Secretary of the Services, Press and Broadcasting Committee to newspaper editors, news editors in broadcasting, editors of periodicals concerned with defence information and to selected publishers. The object is to request a ban on publication of specified subjects which relate to defence of national security." The system is a voluntary one, but behind it is the threat of a prosecution under the Official Secrets Act.

B. *Prosecutions Under the 1939 Act*

Well over half the Canadian prosecutions under the Official Secrets Act arose as a result of the defection of Igor Gouzenko in 1946 and his revelations about a series of spy rings operating in Canada.[44] Almost all of these prosecutions were under the espionage section of the Act (section 3), although in one case[45] the leakage section (section 4) was added as an additional count and in another[46] the leakage section alone was used. Many of the prosecutions also involved conspiracy charges under the Criminal Code to breach the Official Secrets Act, but these can be considered Official Secrets Act charges.[47]

There have been only four prosecutions since the Gouzenko revelations:[48] against *Biernacki* in 1961, *Featherstone* in 1967, *Treu* in 1978, and the prosecutions that have recently taken place against the *Toronto Sun*, its publisher, Creighton, and editor, Worthington.

The *Biernacki* case[49] will be dealt with in detail in a later section because it is an important case on the question of what type of information is covered under the Act. In brief, Biernacki was a landed immigrant from Poland who was doing work preparatory to the setting up of a spy ring in Canada. He was charged with five counts involving section 3 of the Act, the espionage section. (The last two counts also involved section 9, the attempt section.) This case was discharged at the preliminary hearing stage on the basis that the information he was collecting was not the type of information envisaged by the Act and further, in relation to the attempt charge, that his activities had not gone far enough to constitute an attempt. Judge Shorteno (then a Judge of the Sessions of the Peace, now a Superior Court judge) in discharging the accused did not view Biernacki's activities in a serious light, stating:[50]

> "My own personal opinion, formed after a reading of the depositions and exhibits, is that if there was such a task given to him or else, if one was expected in the normal course of events, then the accused must have *indeed* sought to evade it by gathering, as he had, insignificant, worthless, public information, so that he might perhaps be able to return to his country and family as a stupid and incompetent, although nonetheless, persona grata and, at the same time, leave behind our own, unsullied and unscarred."

Featherstone was convicted and sentenced to 2 1/2 years under section 3 of the Act (the espionage section) for trying to pass secret marine charts to the Russians.[51] The charts showed the position of shipwrecks off the east coast, a valuable piece of information for a foreign government because submarines could hide beside the wrecks to avoid detection.

The two most recent cases involved prosecutions under the leakage section of the Act. Treu was convicted on two counts relating to secret air communication systems, information he had obtained while working for the Northern Electric Company: one charge under section 4(1)(c), related to unlawfully retaining the documents, brought a sentence of two years; and a second count under section 4(1)(d), related to failing to take reasonable care of the documents, brought a concurrent sentence of one year. The trial was conducted *in camera*, a point that will be discussed later, and, all that was then publicly known about the trial was the *judgment* of the Court, which by law cannot be *in camera*. This judgment is appended to the House of Commons Debates of June 9, 1978.[52] On that day a lengthy discussion of the Act and the *Treu* case took place (under one of the days allotted to the opposition under Standing Order 58) on a motion by Mr. G. W. Baldwin:[53]

> "That this House notes with concern the secret trial of Alexander Peter Treu and the harassment of the Toronto *Sun* and its editor, Peter Worthington, under the provisions of the Official Secrets Act, and urges the establishment of a special committee of this House to recommend such changes in the Act as will limit its scope to matters directly related to national security and defence."

Not surprisingly, the motion was talked out and the House adjourned without the question being put. Treu appealed both his conviction and his sentence to the Quebec Court of Appeal.[54] The Federal government instructed its counsel to request that the Quebec Court of Appeal release parts of the trial judge's ruling relating to secrecy, but this was rejected by the Court of Appeal.[55] On February 20, 1979 the Court unanimously set aside the conviction and entered an acquittal[56] because, on the whole of the evidence, the Appeal Court found that there was a reasonable doubt. The Court did not examine the secret material because, in their view, "the contents were largely irrelevant."[57]

The final case involved publication by the Toronto *Sun* of a document designated as "top secret", which outlined suspected Russian espionage activity in Canada. The charges against the *Sun* and its publisher and editor, Creighton and Worthington, were that they received and published the document in contravention of subsections 4(1)(a) and 4(3) of the Official Secrets Act. The charges were dismissed at the preliminary hearing stage by Judge Carl Waisberg on April 23, 1979.[58] Judge Waisberg concluded that "the document was no longer, if ever, 'secret'."[59] In his view, earlier disclosures had "brought the document, now 'shopworn' and no longer secret, into the public domain."[60]

In addition, there have been cases where the police have used their powers of search under the Act because of suspected violations of the Act;[61] indeed, the offices of the *Sun* itself had been searched a few years earlier after Peter Worthington had published in his column what was stated to be a classified letter from the head of the R.C.M.P. Security Service, General Dare.[62] And there have been a number of cases where a prosecution could not be brought because of diplomatic immunity;[63] in such a case the diplomat is declared

persona non grata and is asked to leave the country.[64] The latest such incident was on February 9, 1978, when Donald Jamieson, the Secretary of State for External Affairs, announced in the House:[65]

> "Mr. Speaker, at noon today, on my instructions, the Under-Secretary of State for External Affairs requested the Ambassador of the Soviet Union to withdraw 11 Soviet nationals from Canada for engaging in inadmissible activities in violation of the Official Secrets Act, and of course of their status in Canada. Two other Soviet nationals who were involved have already departed Canada but will not be permitted to return. A strong protest has been conveyed to the Soviet authorities about these activities.
>
> The Soviet Ambassador was informed that the Canadian government had irrefutable evidence that all 13 persons had been involved in an attempt to recruit a member of the RCMP in order to penetrate the RCMP Security Service. Nine of the Soviet nationals still in Canada are employees of the Soviet embassy, one is an official of the Soviet Trade Office in Ottawa, and one is a member of the International Civil Aviation Organization Secretariat in Montreal....
>
> Not only did this operation involve a large number of persons but it had been elaborately planned, involving coded messages, clandestine meetings, secret concealment devices and the payment of $30,500. This unsuccessful operation was mounted by the Soviet intelligence service in April 1977. It has involved no compromise to national security."

There have undoubtedly been many other cases involving other than diplomats where, for various reasons, charges were not brought; one reason that the Spencer case,[66] for example, did not result in a prosecution was because it was discovered that he was dying from lung cancer.[67]

A list of prosecutions in England under their Official Secrets Act is contained in an Appendix to the Franks Report.[68] Since 1946 there have been 23 prosecutions for espionage (under section 1 of the 1911 Act)[69] resulting in 19 convictions (including the convictions of such well-publicized spies as Fuchs, Blake, Walsh and Lonsdale)[70] and one acquittal. The list includes the prosecutions against Aubrey, Berry and Campbell (the so-called *ABC* case) in the 42 day trial that took place in the Fall of 1978 and ended, in effect, in the dropping of the espionage charges by the Attorney General after the trial judge had expressed the view that it would be oppressive to invoke the espionage section save in the clearest and most serious of cases, which this case was not.[71] The accused were, however, found guilty under the leakage section.[72] Unlike Canada only one of these was a conspiracy charge. But like Canada the charges for the most part involved passing information to the Russians: Russia was involved in 15 of the convictions, Czechoslovakia in 2, and Poland and Iraq in one each. The espionage prosecutions certainly confirm Professor Griffith's view that: "When actions are brought they are almost always successful."[73]

Since 1946 there have been over 35 persons prosecuted in England for breaches of the leakage sections,[74] involving a wide variety of circumstances, such as a present or former civil servant or military person supplying information to the press, or to criminals, or improperly retaining it. In several cases the charge involved passing information to a foreign embassy: in one case (in

1962) to the Yugoslav Embassy and in another (in 1968) to the Soviet Embassy; in these cases one can see how the espionage and leakage sections can be related and how the leakage provisions are sometimes used as a back-up charge when it is difficult to prove the more serious charge of espionage.[75]

C. *Scope of Section 3(1) of the Act*

Section 3(1) of the Act reads as follows:

> Every person is guilty of an offence under this Act who, for any purpose prejudicial to the safety or interests of the State,
>
> (a) approaches, inspects, passes over, or is in the neighbourhood of, or enters any prohibited place;
>
> (b) makes any sketch, plan, model or note that is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power; or
>
> (c) obtains, collects, records, or publishes, or communicates to any other person any secret official code word, or pass word, or any sketch, plan, model, article, or note, or other document or information that is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power.

The section is potentially very broad, particularly subsection (c) dealing with communicating information useful to a foreign power, the section under which most espionage cases are prosecuted. Let us look first at subsection (a).

Subsection (a) prohibits being in or in the neighbourhood of a prohibited place. (The 1920 Act amended the subsection to include "passes over", presumably not considered important in 1911 before aerial reconnaissance.) There is a complicated definition of prohibited place in the Act (s. 2(1)). The definition is not as wide as it might appear on first reading because the words "any work of defence belonging to or occupied or used by or on behalf of Her Majesty" appear to qualify everything that follows. So although the definition includes places used "for the purpose of getting any metals, oil or minerals of use in time of war" it would seem to be referring only to places actually "belonging to or occupied or used by or on behalf of" the Government.[76] Nevertheless, the section does include such places as "armed forces establishments", government "factories", "dockyards", and "ships".[77] Moreover, the definition can be extended by the Cabinet under subsection (c) to include "any place that is for the time being declared ... to be a prohibited place on the ground that information with respect thereto or damage thereto would be useful to a foreign power." No such regulations appear to have been passed.[78]

The "prohibited place" subsection was the subject of controversy in England in 1961 in the *Chandler* case[79] when members of a group, the Committee of 100, founded by Bertrand Russell, formed to further the aims of the Campaign for Nuclear Disarmament, were charged with conspiracy to breach the comparable English "espionage" section by disrupting the operation of Wethersfield air base, then used by American planes carrying nuclear weapons. They were convicted, five persons being sentenced to 18 months and one to 12 months, and their appeals eventually reached the House of Lords. It

was argued that the section was not meant to cover such conduct, but was limited to spying; the marginal note to the section in England is "Penalties for Spying" (in Canada, simply "Spying"). But the House of Lords dismissed the accused's appeals from their convictions stating that marginal notes are not an integral part of the Act and that, in the words of Lord Reid, "it is impossible to suppose that the section does not apply to sabotage and what was intended to be done in this case was a kind of temporary sabotage."[80] So, the English and no doubt the Canadian section is wider than espionage.

Section 3(d) of the U.K. 1911 Act permits a Secretary of State to expand the definition of a prohibited place in certain cases on the ground that "the destruction or obstruction thereof, or interference therewith, would be useful to an enemy." These words were relied on in the *Chandler* case as indicating an intention to include the conduct in question. The words are not used in the Canadian Act, but we do find the words "damage thereto would be useful to a foreign power." These words, which are also found in the U.K. legislation and were also relied upon by the Court in *Chandler*,[81] are not as strong as those in the English Act to cover Chandler-type obstruction, but they do seem to cover sabotage, a matter of increasing concern in the case of nuclear energy.[82]

The demonstrators in the *Chandler* case tried to prove that what they did was not "for a purpose prejudicial to the safety or interests of the State", but this was not permitted. To quote Lord Reid again,[83] it is "hardly credible that the Parliament [in 1911] intended that a person who deliberately interfered with vital dispositions of the armed forces should be entitled to submit to a jury that Government policy was wrong and that what he did was really in the best interests of the country, and then perhaps to escape conviction because a unanimous verdict on that question could not be obtained." Thus all that was required was the immediate intention or desire to do the acts they did and not the desire to prejudice the interests of the state.[84]

All prosecutions in Canada under section 3 have involved subsection (c).[85] The subsection is potentially extremely wide. In order to understand its scope let us break it down into the following segments:

(a) every person
(b) is guilty of an offence under this Act
(c) who for any purpose
(d) prejudicial to the safety or interests of the State
(e) obtains or communicates
(f) any information
(g) that might be directly or indirectly useful
(h) to a foreign power

Each of these segments merits a brief discussion.

(a) *Every person.* Every person[86] who breaches section 3 *in* Canada is guilty of an offence; but if the offence is committed *outside* Canada then, because of section 13, only those who were at the time of the commission of the offence Canadian citizens within the meaning of the Canadian Citizenship Act are guilty of an offence. This is more or less in line with the extraterritorial

effect of the treason section, although in one respect it is narrower and in another broader. It is narrower in that the extraterritorial effect of the treason section (section 46(3)) extends to both a Canadian citizen and "a person who owes allegiance to Her Majesty" which would, for example, include a landed immigrant; it is broader in that section 13(b) extends liability extraterritorially to persons who are no longer citizens or who no longer owe allegiance to the Crown if the information that is the subject of the charge was obtained while owing allegiance to the Crown. In other words, a defector from Canada may be able to avoid a treason charge if he communicates secrets after he leaves Canada[87] and after he has given up his citizenship and passport,[88] but he cannot escape a conviction under the Official Secrets Act should he ever return to Canada.[89] The section extending the extraterritorial effect of the section, possibly through oversight, was not introduced in Canada until 1950. Indeed, it was only in Committee that it was noticed by Donald Fleming, later the Minister of Justice, that the proposed amendments made the offences triable and punishable in Canada, but did not specifically extend the criminal law outside Canada. The section was then redrafted to make conduct outside Canada "an offence against this Act."[90]

(b) *is guilty of an offence under this Act.* Under section 15 of the Act a person committing an offence is "deemed to be guilty of an indictable offence and is, on conviction, punishable by imprisonment for a term not exceeding fourteen years." The penalty had been set at 7 years in the 1939 legislation, but was raised to 14 years in 1950, the same as the penalty in England.[91] No doubt the post-Gouzenko trials had indicated that higher penalties might well be necessary in the future, although none of those prosecutions reached the 7 year maximum then permissible.[92] Moreover, in England several persons convicted under the Official Secrets Act after the war had received more than 7 years. Dr. Allan Nunn May, who had worked in Canada,[93] received 10 years in 1946 and Dr. Klaus Fuchs was given the maximum penalty permitted in England of 14 years in 1950.[94] Indeed, later English cases have exceeded the 14 year term by using the questionable technique of cumulative sentencing on multiple counts — questionable in that it makes a mockery of the legislatively imposed maximum penalty because multiple counts are almost always possible in espionage cases. This technique was used in the *Blake* case in 1961 to impose a 42 year sentence, i.e., 14 years on each of 3 counts,[95] and heavy sentences have been imposed in other cases, such as the 1961 cases of Lonsdale (the spy who used a Canadian passport) who received over 20 years[96] and Vassall who received 18 years.[97] One consideration in imposing heavy sentences might be, as Jonathan Aitken has written,[98] that "heavy sentences are now an essential ingredient in the international game of spy-swapping."

The 14 year or even higher penalty may well be proper for espionage offences under section 3, but it is surely inappropriate for leakage cases under section 4. This is one of the unfortunate results of having the two separate offences in the same Act: they are treated with equal seriousness.[99]

The Crown has the option under section 15 of proceeding for any offence by way of summary conviction. (This election cannot be challenged as con-

trary to the Canadian Bill of Rights.)[100] The penalty in such a case is up to 12 months imprisonment.[101] The English 1920 Act also permits a summary trial,[102] but it does not apply to the espionage section. Perhaps nowhere else in Canadian criminal law is there such a wide discrepancy between the penalty for the indictable offence and the penalty for the summary offence.[103] Further, nowhere else in Canadian criminal law can an accused be deprived of a jury for such a serious offence or one with such important political overtones.

Having cleared away some technical aspects of the section, let us return to the main theme — the potentially wide impact of the section.

(c) *who for any purpose.* We have already seen that the House of Lords in the *Chandler* case[104] did not interpret "purpose" as meaning motive. Thus this hurdle is not as difficult for the Crown to get over as it might appear to be on first reading.

(d) *prejudicial to the safety or interests of the state.* This phrase is more favourable to the Crown than the comparable phrases in the treason and sabotage sections of the Code which state respectively, "prejudicial to the safety or defence of Canada" (section 46(2)(b)) and "prejudicial to the safety, security or defence of Canada" (section 52(1)(a)). It will be recalled that the original draft of the treason provision had also used the words "safety or interests" but the Senate had rejected the phrase.[105] It is unlikely that the Courts will construe the word "interests" as narrowly as the word "defence". It could, for example, encompass economic matters relating to trade, or monetary and fiscal policy. This interpretation would be consistent with Lord Pearce's remarks in *Chandler* v. *D.P.P.*[106] that "the interests of the State must ... mean the interests of the State according to the policies laid down for it by its recognized organs of government and authority .... Anything which prejudices those policies is within the meaning of the Act 'prejudicial to the interests of the State.' " Surely the word "interests" should be replaced with something more concrete. The Australian section, for example, uses the phrase "safety or defence".[107] Alternatively, and perhaps preferably, the same result could be achieved by narrowing the definition of "information", as the U.S. Brown Commission has proposed.[108]

(e) *obtains or communicates.* There are other verbs in the section, but these will do to show the scope of the section, which is fortified by definitions[109] which, for example, state that expressions referring to communicating include communicating the "substance, effect or description" of a document or information.

(f) *any information.* It is this part of the offence that has created difficulty in Canada, although it has not done so in England. Judges have used it as a means of limiting the otherwise very wide scope of the section. A detailed discussion of this aspect of the section will be set out later.

(g) *that might be directly or indirectly useful.* This is clearly an objective test. It does not look at what the accused intended. Thus one can disregard the alternate more stringent tests — "is intended to be", which is a subjective test, and "is calculated to be", which may or may not be subjective"[110] — set

out in the subsection. In laying charges under the espionage section in the *ABC* case,[111] the Crown relied on the objective test: the information was not intended to be communicated to the enemy, but it would have been useful to them.

(h) *to a foreign power.* The 1911 English legislation had used the phrase "useful to an enemy." This was expanded judicially by Mr. Justice Phillimore in the English Court of Criminal Appeal in the 1913 case of *Parrott*.[112] Mr. Justice Phillimore stated that a state of war was not necessary: an enemy includes "a potential enemy with whom we might some day be at war."[113]

The proposed 1939 Canadian Act had, like the 1911 English legislation, used the word "enemy" but this was changed in Committee to "foreign power." The Minister of Justice, Ernest Lapointe, simply stated, "In time of peace there is no enemy."[114] No mention was made of the judicial extension of the word "enemy" in the *Parrott* case.

Although it is uncertain what the Courts meant by a "potential enemy", it seems reasonably clear that the English courts would not expand this phrase to include every foreign power, even though every country is in a sense a potential enemy.[115] Thus the Canadian section is much wider than the comparable English section. So wide, in fact, that this may have influenced Canadian courts to try to restrict the meaning of the concept of "information" in the Canadian legislation, which has never been considered necessary in England. After all, one would have no sympathy with an accused who passed any information, of whatever type — even if it was not confidential government information — to a foreign state when war was imminent, as in the case of Germany in 1913 or 1939. The same attitude would not prevail, however, with respect to passing that information to any "foreign state", whatever its relationship with Canada might be. Let us now return to the interpretation of the word *information*.

D. *Must the Information be "Official and Secret"?*

In the *Biernacki* case,[116] previously mentioned, Judge Shorteno dismissed the accused at the preliminary hearing, holding that there was not sufficient evidence to warrant a committal for trial. Biernacki came to Canada from Poland and collected information preparatory to the setting up of an espionage ring. The information being collected by Biernacki was, according to the judgment, not the type of information contemplated by section 3(1)(c) of the Act. Judge Shorteno posed this question:[117] "Do the words 'secret official' qualify 'code word or pass word' exclusively or do they also qualify the rest of the clause as well, e.g., secret official information?" He ruled that the latter interpretation was the correct one.[118] But however much one may sympathize with the result, the interpretation cannot be correct. The words "secret official" did not appear in England in the 1889 or 1911 U.K. Acts. They were, in fact, added by a Schedule at the end of the 1920 Act and were referred to in the Act itself as "minor details."[119] No one suggested that by adding these words they were changing the meaning of the 1911 Act. As we know, the 1911

Act was introduced in part to control the activities of German agents who were openly collecting information that was clearly not secret or official information (e.g. sketching harbours).[120] So it is not at all surprising that in England, to quote the Franks Committee, "it is clear that the words 'secret official' qualify only the words 'code word, or pass word.' "[121] Not only is this the interpretation given to the espionage section, but in the leakage section, where the words "secret official" are also used, it has been held in England that the information under the section need be only "of an official character" and not necessarily secret.[122] When Canada enacted the Official Secrets Act in 1939 there was no indication that a substantial departure from the 1911 and 1920 English legislation was intended.[123]

The grammatical construction, it is true, points in both directions. In favour of Judge Shorteno's ruling is the fact that there is a comma between "code word" and "pass word", which is some indication that the words "secret official" qualify the complete list. On the other hand, the phrase "secret official" is used nine times throughout the Act[124] and in each case it precedes the words "code word or pass word." In six of these cases no comma is used.[125] Moreover, in two cases the phrase "secret official code word or password" comes at the end of the same list found in section 3(1)(c) and therefore cannot possibly qualify the earlier specific items.[126] Finally, in the French version of section 3 no comma is used. Indeed, the word "secret" is not used at all in the section: "un chiffre officiel ou mot de passe."

The best argument in favour of limiting the Act to information which is secret and official is the title of the Act, the Official Secrets Act, but the title cannot control the otherwise clear intention of Parliament.[127]

Judge Waisberg in the recent *Toronto Sun* prosecution assumed that the information had to be secret. It will be recalled that he discharged the accused on the preliminary hearing because the information could no longer be considered secret. Two other Canadian cases, *Spencer*[128] and *Boyer*,[129] also have a bearing on the issue. Spencer was a post-office employee who supplied the Russians with important information that would help them establish foreign agents in Canada. This consisted of outwardly innocuous information on such matters as names, with dates of birth and death, gathered from tombstones in local cemeteries. The Russians could then send in an agent with a birth certificate and other documentation who would take on the identity of one of these persons. Since the real person was dead the chance of detection was lessened. (Lonsdale, the spy convicted in England, had first established his identity in Canada in a similar way; the real Lonsdale's father proved that the "Lonsdale" in England could not be his son because his son had been circumcized, but the English "Lonsdale' was not.)[130] In addition, Spencer supplied other information such as pictures of pipelines and details of post-office procedures for checking mail.

Mr. Justice Wells, the Commissioner who investigated Spencer's dismissal from the post office, stated:[131] "quite frankly, and for what it may be worth, I would express the personal opinion that it would be straining the language of Section 46 of the Criminal Code, Sub-section (c) or of the Official

Secrets Act to initiate a prosecution under those Statutes." He went on to say that the Government did not act improperly in dismissing Spencer because "a civil servant does not have to commit a crime to merit dismissal."[132] Therefore Mr. Justice Wells' view was more in the nature of an aside and was not a necessary part of his reasoning. One can certainly agree with his view that the treason section does not cover this conduct, not because the information in such a case has to be "secret official" — it clearly does *not* — but because the information provided by Spencer would not come within the language "military or scientific information." But surely Spencer could have been convicted of a breach of the leakage section (section 4) of the Official Secrets Act in that he improperly supplied official government information concerning the post office. Yet on the key question being analyzed in this section we have Mr. Justice Wells' opinion, but without analysis, that by collecting information in the public domain and unclassified government information no offence had been committed. There is a hint that Spencer would have been guilty if the information he gathered was "secret or classified."[133] This is a different test from the one used by Judge Shorteno, but it is worth considering as a possible compromise between saying that all information comes within the Act and that only secret official information does.

The *Boyer* case[134] also offers a possible compromise between the two extreme positions. Mr. Justice Marchand, for the Quebec Court of Appeal, stated, relying on the language of the earlier Defence of Canada Regulations (section 16(3)(a)), that the provisions of the Official Secrets Act "do not apply to what has already been published or publicized, or has fallen into the public domain."[135] The ruling can be considered *obiter* because the court dismissed the accused's appeal on the basis that there was "no substantial wrong or miscarriage of justice."[136] The earlier Defence of Canada Regulations had made it an offence "to communicate ... any information ... which might be useful to the enemy ..." and then provided an exception that no one would be guilty if he communicated information that "has, before being so ... communicated, appeared, or is fairly deducible from information which has appeared, in any printed publication or publications distributed to the public in Canada through government or normal commercial channels." The exception is certainly understandable in a section that did not require any prejudicial purpose, as the Official Secrets Act does, but was designed to prevent any loose talk to anyone.

Mr. Justice Marchand's approach may turn out to be a very sensible guide in redrafting the legislation — and the section should surely be redrafted in view of the doubt surrounding its interpretation — because his interpretation allows foreign agents, including, of course, those with diplomatic immunity, to collect information from newspapers, books, and official published reports, which foreign governments undoubtedly do now, but prevents them from collecting this information themselves when it is to be used *for a prejudicial purpose*. The Security Service could still, therefore, consider it a breach of the Official Secrets Act for a foreign agent to take photographs of pipelines, dams, and harbours which could be used by the foreign country for sabotage purposes or for bombing in the event of a war. (This may be an unrealistic

example today because of satellite reconnaissance; other examples might include collecting unpublished scientific matters.) In the event of an actual war, regulations could be brought in making the disclosure of *any* information for a prejudicial purpose an offence. An alternative technique would be to expand the concept of a prohibited place, but that would expand the espionage section, as well as the leakage section (which also deals with prohibited places), to too great an extent.

The Mackenzie Report[137] stated that the ideal Act "should protect unclassified information from attempts at collection and dissemination which are prejudicial to the interests of the state or intended to be useful to a foreign power." It is not clear whether they meant by "unclassified information" only information that is in the possession of the government.

We shall return to an analysis of this point in the concluding part of this Section. For the moment, suffice it to say that the best solution to the problems of the espionage section is, firstly, to require a purpose prejudicial to the "safety or defence" of Canada rather than to the "safety or interests" of Canada, and secondly to adopt the test proposed in the *Boyer* case (which would include all information which has not already been published or publicized).

E. *Presumptions*

The Act's "unusual evidential and procedural provisions" appeared to the Mackenzie Commission to be "extraordinarily onerous".[138] There is no doubt that the extent of the evidentiary provisions is unusual and probably unnecessary. Some of the provisions (our present section 3(2)), as we saw earlier, were introduced in 1911 to make it easier for the Crown to prove that the accused's purpose was prejudicial to the interests of the State. The then newly-formed anti-espionage service, later known as MI5, played a key role in promoting these presumptions.[139] Further and stronger evidentiary provisions (our present 3(3) and 3(4)) were added in the 1920 legislation.

The 1911 provisions (our present 3(2)) make it easier for the Crown in a number of ways. In the first place it states that "it is not necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State." This makes clear what would probably have been the interpretation in any case. The section then goes on to say that the accused "may be convicted if, from the circumstances of the case, or his conduct, or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State." This provision changes the law because it allows into evidence material concerning the accused's character which would not normally be permitted as evidence-in-chief in a criminal case, and because it would seem to permit similar fact evidence which again is not normally permitted. Finally, the section provides that if any information relating to a prohibited place is unlawfully communicated "it shall be deemed to have been ... communicated for a purpose prejudicial to the safety or interests of the State unless the contrary is proved,"

thus shifting the onus of proof.[140] It is interesting to note that the U.S. Justice Department had proposed legislation in their 1911 Espionage Act modelled on this section of the English Act, but it was eliminated by the House Judiciary Committee on the ground that it was regarded as "not fair."[141]

The 1920 amendments provide that the accused's communication with a foreign agent "is evidence that he has, for a purpose prejudicial to the safety or interests of the State, obtained or attempted to obtain information that ... might be ... useful to a foreign power" (section 3(3) of the Canadian Act). A further subsection (section 3(4)) sets out a wide definition of "an agent of a foreign power" and a presumption with respect to communication with such a person — a unique example of one presumption being used to support another.

The intent of these later provisions is not clear. Do the words "is evidence" mean conclusive evidence, rebuttable evidence, or merely some evidence? In *Benning* in 1947[142] the Ontario Court of Appeal gave the subsection a very narrow construction suggesting,[143] (it was not necessary for the purpose of deciding the appeal), that "its real purpose and effect are limited, and are only to enable the Crown, by its application in a case where there is other evidence of the acts of the accused, to give *prima facie* evidence that the purpose of the accused was as charged, and that any information obtained, or attempted to be obtained, by him was of the character mentioned in the charge." Thus, the fact of communication with a foreign agent could not without other evidence justify a conviction.[144] And even if there should be further evidence it would seem that the presumption would merely ensure that the case got to the jury and not shift the onus of proof.[145]

These provisions may well be unnecessary. Convictions can surely be obtained in serious espionage cases without them. This was the view of one of the principal prosecutors in the Gouzenko trials, John Cartwright, later the Chief Justice of Canada, who stated that he did not "think that any of those who were convicted were convicted because of any special statutory presumptions which the Act contains."[146] Further, the presumptions do not apply to conspiracy prosecutions[147] and many of the espionage prosecutions have in the past taken that form. Finally, the presumptions violate the spirit of the Canadian Bill of Rights,[148] although with the limitations imposed by the Ontario Court of Appeal in *Benning* (1947), probably not its letter. The Bill of Rights provides (section 2(f)) that "no law of Canada shall be construed or applied so as to ... deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law ...." There is no provision in the Official Secrets Act, as there is in the War Measures Act,[149] stating that the Act shall operate notwithstanding the Bill of Rights. Although the Supreme Court of Canada has said that legislation can be declared inoperative by the Courts,[150] it is clearly reluctant to permit this. The Courts are likely to take the approach of the Court in *Benning* and give a very narrow interpretation to the presumptions, thereby allowing them to live with the Bill of Rights.[151]

F. *Secrecy*

Section 2(f) of the Bill of Rights, previously quoted, goes on to state that the accused must be "proved guilty according to law in a fair and public hearing by an independent and impartial tribunal." This, of course, reflects the common law's concern for public trials.[152] The Official Secrets Act provides, however, that in a prosecution under the Act the Court may make an order that "all or any portion of the public shall be excluded during any part of the hearing" ... "if, in the course of proceedings ... application is made ... that the publication of any evidence to be given or of any statement to be made in the course of the proceedings would be prejudicial to the interests of the State."[153] If the judge refuses to make the order then the prosecutor must decide whether to abandon the prosecution or disclose the evidence. The section was first introduced in the 1920 U.K. Act, probably because of the fear that the 1913 House of Lords case of *Scott* v. *Scott*,[154] which strongly upheld the concept of public trials, would not permit *in camera* proceedings in these cases.[155] Again, it is unlikely that the Courts would declare the section inoperative as contrary to the Bill of Rights,[156] but the Bill of Rights would no doubt be used to give the section a narrow construction. Clearly, the sentencing has to take place in public because the section specifically states that "the passing of sentence shall in any case take place in public."[157] Although nothing is stated concerning the verdict, this should also take place in public because it would not involve "any evidence to be given or ... any statement to be made in the course of the proceedings."

Similarly, the commencement of the trial should be in public and remain public until it is necessary to go into an *in camera* session, as occurred, for example, in the *Rose* and *Featherstone* cases.[158] The section does not seem to contemplate a completely secret trial because the order of exclusion can only be made "in the course of proceedings" (as opposed to "the commencement of proceedings"), and the exclusion of the public is to be "during any part of the hearing" (as opposed to "during the whole or any part of the hearing").[159]

The *in camera* hearing in the *Treu* case[160] created considerable controversy. In that case the application for an *in camera* hearing was made, to quote the then Minister of Justice,[161] "because the documents which would be reviewed included a large number of NATO documents and testimony of witnesses concerning those documents." The case is complicated by the fact that the accused's counsel did not object to a closed hearing, stating, "as far as that request is concerned, I have no representation."[162] It will be recalled that Treu's convictions were quashed by the Quebec Court of Appeal. There was no criticism of the *in camera* procedure. In fact, Kaufman J.A.[163] went out of his way to state that "the learned trial judge, faced with an application for the exclusion of the public, had little choice but to grant this since, at the outset, he could hardly foresee the nature of the case and the importance of each piece of evidence. His discretion was therefore severely restricted, and no blame should be attached to his decision to proceed *in camera*. It was, at the time, the only safe course to adopt."

The section refers to excluding "all or any portion of the public" from the hearing. Sometimes the Court, as in the *Biernacki* case,[164] does not exclude the public but asks the Press not to publish the proceedings. Another variation is that used in what is known as the "Colonel B affair" in England. In the committal proceedings in the *ABC* prosecution under the Official Secrets Act the magistrates permitted a member of the Security Service to give his evidence publicly but to be identified only as Colonel B, although the court was aware of his name which he had written on a piece of paper. The identity of Colonel B was disclosed by a number of journals and contempt proceedings were then brought. Counsel for the Attorney-General argued that unless the courts could protect witnesses in this way, proceedings would have to take place in private.[165] The Divisional Court found the defendants guilty, stating: "Whatever the motives of the respondents have been, they appear to have lost sight of the fact that in pursuing their course of action they were flouting a decision of the court — not simply disagreeing with a decision of the Security Service, or campaigning for a reform of the Official Secrets Acts, 1911-1939."[166] The House of Lords[167] reversed the Divisional Court and quashed the convictions on the ground that on the particular facts there had been no interference with the due administration of justice in the publication of his name. The Court held, however, that the practice followed by the magistrates was a proper one: if they could hear the evidence *in camera*, surely they could adopt a less drastic procedure.

Another controversial procedure in the *ABC* case was the obtaining in advance, (by an *ex parte* application to a judge), of the list of jurors to enable the jury panel to be checked for potentially disloyal members.[168] The Crown could then use its power to ask a juror at the time of selection to "stand aside" or could challenge the juror. It is not clear whether jurors who hear evidence *in camera* are under the Official Secrets Act. They would appear to be; but even if not, they would be subject to a charge of contempt if they improperly revealed information heard *in camera*.

In the United States the constitutional right to a "public" trial has meant that it is difficult to prosecute in espionage and leakage cases.[169] The defendant can exert what is termed a form of "gray-mail", that is, that the prosecution must "disclose or dismiss".[170] A U.S. Senate Sub-committee on Secrecy and Disclosure reported in October 1978 that they were "not prepared at this time to recommend a general recasting of the federal espionage Statutes along the lines of the British Official Secrets Act."[171] Instead, they recommended a number of administrative and other techniques such as the withdrawal of pension rights for former employees who violate security.

G. *Police Powers*

Police powers in relation to matters of national security will be dealt with in a later section, but a discussion of the Official Secrets Act would be incomplete without some discussion of the very wide police powers exercisable under the Act. The powers were made even wider in 1946 by a much criticized[172] special Order-In-Council to deal specifically with the Gouzenko cases, which

permitted the Minister of Justice to make an Order that a person "be interrogated and/or detained in such place and under such conditions as he may from time to time determine."[173] Section 21(1)(c) of the Defence of Canada Regulations (1942), which were then still in force, was similar, but did not provide for interrogation, and there was no right of interrogation under the Canadian Official Secrets Act, as there was and still is in England.[174]

The Act itself provides for the power to arrest without warrant any person "reasonably suspected of having committed, or having attempted to commit, or being about to commit, ... an offence."[175] Although the ordinary criminal law also includes the power to arrest a person "about to commit" an indictable offence,[176] it requires in all cases that the officer reasonably *believes* rather than reasonably *suspects* that an offence has been or is about to be committed, an obviously higher standard.[177] It is arguable that by combining the arrest section and the attempt section (s. 9)[178] a person may be arrested on suspicion that he is about to commit an act preparatory to the commission of an offence, but this may be extending the power to arrest farther than is warranted by the section.

The Taschereau/Kellock Royal Commission appears to suggest that there is no limit on the length of time that the police may hold a person who has been arrested for being about to commit an offence under the Act.[179] They state:[180] "The release of a person reasonably suspected of being about to communicate information contrary to the statute merely because no charge has been made where no charge could in law be made, would not be in accord with the purpose of the authority given by section 10 to arrest and detain such a person." But surely this cannot be correct; in such a case the person arrested would have to be brought before a Justice of the Peace within a reasonable time and in any event within 24 hours. This is the present law under the Criminal Code.[181] The Code is, by virtue of the Interpretation Act (section 27(2)), applicable to indictable offences outside the Code. This is also consistent with the interpretation of the comparable English section.[182] If there is not sufficient evidence to bring a charge, he must be released.

The power to search (section 11) also uses the concept of *suspicion* and is therefore also wider than the power of search in either the Criminal Code[183] or the Narcotic Control Act[184] which require the Justice of the Peace to have "reasonable ground to believe" rather than "reasonable ground for suspecting."[185] Moreover, having obtained a search warrant on the basis of suspicion, the police officer can, without limitation, search the "place and every person found therein."[186] Further, when the case is one of "great emergency" a senior R.C.M.P. officer can grant the search warrant (section 11(2)), but even without the section senior R.C.M.P. officers have such a power.[187] It can be argued, however, that the specific mention of the right to search without a judicial warrant in cases of "great emergency" eliminates non-judicial authorizations in other cases.

The 1920 English Act contained a section (section 6) requiring every person who had any information concerning a breach of the Act to supply information to a senior police officer on demand or face a penalty. This was

the subject of controversy when Duncan Sandys, then a young M.P., was threatened with prosecution under the Act if he did not give information in his possession to the Police.[188] The section was narrowed after a Parliamentary inquiry[189] so that it now applies only to section 1 (i.e., espionage) offences and only with the approval of a Secretary of State. The Canadian Act did not carry over this provision but limited the duty to provide information to persons who knowingly harbour a person who has committed or is about to commit an offence or who permitted such a person to meet in his premises.[190]

A further section in the 1920 U.K. legislation relating to the inspection of various forms of communication was only carried over in part into the 1939 Canadian Act. Section 7 of the Canadian Act deals only with the inspection of telegrams sent in or out of Canada. It does not include mail. In the English legislation the section included letters and postal packets. As we shall see later, the English authorities could inspect letters in the State-run postal service. The 1920 provision ensured that the same power applied to privately-run systems.

Finally, the Act was amended in 1973 to permit, with a warrant of the Solicitor General, the interception of communications. The many problems under this section as well as the right to tap phones before 1973 under the search section (section 11) of the Official Secrets Act will be discussed later.

H. *Conclusion*

This analysis of the espionage provisions of the Official Secrets Act suggests that the law at least requires clarification, and in many cases requires change. Consideration should be given to eliminating the presumptions, permitting the accused to elect a jury trial in all cases, and setting out with greater precision the type of state interest to be protected, possibly, in this latter case, by replacing "safety and interests" with "safety, security or defence" as in the sabotage section of the Code.[191]

The area where the law most needs clarification is with respect to the type of information that is covered by the espionage section. Some have suggested that there should be no limit on the type of information, and others, that it be both "official and secret." Neither position is desirable. The approach borrowed by Mr. Justice Marchand in *Boyer*[192] from the Defence of Canada Regulations, that is, that information which has already been released or is in the public domain not be subject to the Act, is an attractive one.

An alternative approach which attempts to achieve much the same result is that found in the U.S. Brown Commission Report of 1971. It provides that a person is guilty of the offence of espionage who "reveals national security information to a foreign power or agent thereof with intent that such information be used in a manner prejudicial to the safety or interest of the United States."[193] The section goes on to provide that a person is guilty of espionage if he "in time of war, elicits, collects or records, or publishes or otherwise communicates national security information with intent that it be communicated to the enemy."[194] There is also a lengthy definition of "national security information" which includes information on a large

number of military matters and security intelligence and concludes with a subsection extending the definition "in time of war, [to] any other information relating to national defense which might be useful to the enemy."[195] The proposed U.S. section is worth careful consideration because it attempts to incorporate the *Boyer* concept into the section by the use of the word "reveals", rather than relying on a public domain defence.

The word "reveals" is used, according to the Commission's comment to the section, "to deal with problems raised in connection with the transmittal of information in the public domain. It permits a court to distinguish between the assembly and analysis of such information so as to constitute a revelation, and the simple transmittal of, for example, a daily newspaper."[196] As in Canada, the judicial construction of the type of information covered in the U.S. Espionage Act of 1917, i.e. "information relating to the national defence",[197] has caused problems in the past. The U.S. Supreme Court suggested in *Gorin* v. *U.S.* in 1941[198] that communicating to a foreign power information already made public would not be an offence. This was extended by Judge Learned Hand in *U.S.* v. *Heine*[199] to the compilation in 1940 before war broke out of extensive reports on the U.S. aviation industry for use by Germany. The information came from such sources as newspapers, catalogues, correspondence and interviews. As Judge Learned Hand stated,[200] the "information came from sources that were lawfully accessible to anyone who was willing to take the pains to find, sift and collate it." Judge Learned Hand said that the Espionage Statute did not cover this conduct because "no public authorities, naval, military or other, had ordered, or indeed suggested, that the manufacturers of airplanes ... should withhold any facts which they were personally willing to give out."[201] The consent of public authorities, the Judge stated, "is as much evidenced by what they do not seek to suppress, as by what they utter. Certainly it cannot be unlawful to spread such information within the United States; and, if so, it would be to the last degree fatuous to forbid its transmission to the citizens of a friendly foreign power."[202] The Brown Commission, like a number of critics of the decision,[203] would, however, prohibit Heine's conduct in the future because of the interpretation that the Courts would likely give to the word "reveals". Of course, if information is communicated to the enemy in wartime, then any simple disclosure of information, whether accompanied by any analysis or not, would be prohibited, and as we have already seen, there is a wider definition of national security information in wartime than in peacetime. The well thought-out Brown Commission provisions are worth very careful consideration in any future redrafting of the Canadian espionage sections.

It would be preferable to include the espionage sections in the Criminal Code, as in Australia,[204] where they could be integrated with other sections relating to Offences Against Public Order (Part II), such as treason and sedition (or as suggested in an earlier section, armed insurrection).[205] Our espionage sections were, in fact, part of the Criminal Code in 1892; it was probably because of the urgency of the situation in 1939 and the ease of adopting the English provisions with a few modifications that we have a separate Act. Incorporation in the Code could be achieved by means of a separate statute, as

has been done in such other cases as the Bail Reform Act[206] and the Protection of Privacy Act.[207] This would place the provisions in the Code where they belong.

Placing the sections in the Code should not in theory influence who has control of the prosecutions. The recent Supreme Court of Canada case of *Hauser*[208] dealing with the question of the constitutional right of the Federal government to control prosecutions under the Narcotic Control Act left the question open. Pigeon J., speaking for the majority of the Court,[209] stated that the Federal government has the right to institute and conduct proceedings "in respect of a violation or conspiracy to violate any Act of the Parliament of Canada or regulations made thereunder the constitutional validity of which does not depend upon head 27 of s. 91 of the *British North America Act*, no opinion being expressed whether the competence of the Parliament of Canada extends beyond that point." The question, therefore, should be under which head of powers were the offences enacted, not whether they are in the Code.[210] (Espionage-type offences could possibly be enacted under the "peace, order and good government" clause or under national defence.[211]) However, Dickson J., who dissented,[212] thought that placing an offence in the Code will necessarily determine the result, stating: "Parliament has chosen to make these offences criminal in nature, rather than merely leaving them as statutory offences in, say the *Bank Act* or the *Divorce Act*." So, there is some risk in placing the sections in the Code. Nevertheless, it seems highly unlikely that the Supreme Court would deny the Federal government the right to institute and control prosecutions in cases of national concern now falling under the Official Secrets Act.

The special police powers now available under the Official Secrets Act should be carefully considered to see whether the powers should be wider than those permitted under the Criminal Code for such serious offences as treason, or whether, in fact, the powers that the police have should be the same in both cases, as they now are for the interception of communications under section 16 of the Official Secrets Act.

Thus far the discussion has concentrated on the espionage sections of the Official Secrets Act, which are far less controversial than the leakage provision to which we now turn.

Part Three
GOVERNMENT INFORMATION

A number of interrelated concepts are discussed in this Part. The common thread is government information, and for our purposes government information relating to national security. The first section examines the leakage section of the Official Secrets Act[1] which imposes criminal sanctions on the improper communication of government information. We then look at selected bodies and persons, such as Courts and researchers who make special demands for government information, to see what rules now apply and what rules should apply to them. Finally, we look at Freedom of Information laws.

A Freedom of Information Act says what government information *has to be* released on request; it says nothing about what information *may* be released by the government. The Official Secrets Act deals with the improper communication of information which has not already been released. Thus the two Acts deal with different concepts. Yet they are interrelated in that the Official Secrets Act creates, as the Franks Committee points out, "a general atmosphere of unnecessary secrecy .... a general aura of secrecy."[2] This point is developed by the U.K. White Paper released in July, 1978[3] which includes a discussion of Freedom of Information laws as part of its discussion of the Official Secrets Act. The White Paper states[4]:

> "This White Paper is mainly concerned with the new legislation for the reform of section 2 of the Official Secrets Act 1911 [the Canadian s. 4]. Strictly speaking, questions of open government do not depend on section 2, which is concerned only with the information that needs to be protected from unauthorized disclosure by criminal sanctions. Nevertheless, the Franks Report suggested ... that there was a link between the two topics and that section 2 had some effect in creating a general aura of secrecy. The Government believes that section 2 in its present form because of its very wide ambit does have an inhibiting effect on openness in government. It is in no doubt that reform of this section is not only a much needed improvement of the criminal law but a necessary preliminary to greater openness in government.

The 1977 Canadian Government's Green Paper, Legislation on Public Access to Government Documents,[5] points out that the "broad scope of the Official Secrets Act," *inter alia* "constitutes a substantial disincentive to any public servant releasing government documents to a citizen."

The subject of government information is, of course, very much broader than the discussion in this Part. For example, schemes for classifying documents and internal security procedures to prevent improper disclosure of information will only be touched on. Moreover, our attention will be focussed on national security and so there will not be extended discussions of such important topics as Crown Privilege or Cabinet Security, except as they relate to national security.

Rules respecting government information are the subject of debate because of the need to try to establish the proper balance — or to use another and perhaps better analogy, resolve the "inescapable tension"[6] — between the legitimate desire for greater openness in government and the necessity not to divulge information the disclosure of which would be harmful to the interests of the state. Another conflict which operates in this area and is becoming increasingly important[7] is between greater access to information and the protection of confidential information relating to individuals.

These areas require clarification because of the absence of shared understandings in society as to what information should be kept from public scrutiny. The concept of national security was misused by the Nixon administration and the repercussions of those actions are still being felt in all democracies. The publication of the Pentagon Papers by the prestigious New York Times and Washington Post symbolized the "passing of an era"[8] in the United States, and similarly the support by the British Publishers' Association of the publication by a number of fringe magazines of the real name of "Colonel B" may well have had the same symbolic effect in England.[9]

The review of government information in this Part leads to the conclusion that there should be greater access to government information and that the use of the criminal law to protect information should be kept to a minimum.

I. The Official Secrets Act: Leakage

The distinction between section 3, the espionage section, and section 4, the leakage section, has previously been touched on when the history of the Official Secrets Act was outlined. It will be recalled that section 3 requires a "purpose prejudicial to the safety or interests of the State." No such purpose is required for the leakage section. Under section 4(1) (a), if a government employee or former employee "communicates ... information to any person, other than a person to whom he is authorized to communicate with, or a person to whom it is in the interests of the State his duty to communicate it" he is guilty of an offence and liable to a 14 year penalty,[1] a ridiculously high penalty for such an offence.

Although the espionage and leakage sections were distinct in the 1911 Act, an amendment in 1920, which was carried into the Canadian Act of 1939, brought a certain overlap to the two provisions by making it an offence for a person to use "the information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety or interests of the State." This section (s. 4(1) (b)) will therefore provide a fall-back position for the prosecutor if he cannot prove the more stringent "purpose prejudicial to the safety or interests of the State" required by section 3.[2]

A. *Scope of Section 4*

Section 4(1) reads in part as follows:

> 4.(1) Every person is guilty of an offence under this Act who, having in his possession or control any secret official code word, or pass word, or any sketch, plan, model, article, note, document or information ... that has been made or obtained in contravention of this Act ... or that he has obtained ... owing to his position as a person who holds or has held office under Her Majesty, or as a person who holds or has held a contract made on behalf of Her Majesty ...
>
> (a) communicates the code word, pass word, sketch, plan, model, article, note, document or information to any person, other than a person to whom he is authorized to communicate with, or a person to whom it is in the interest of the State his duty to communicate it;
>
> (b) uses the information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety or interests of the State;
>
> (c) retains the sketch, plan, model, article, note, or document in his possession or control when he has no right to retain it or when it is contrary to his duty to retain it or fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof; or
>
> (d) fails to take reasonable care of, or so conducts himself as to endanger the safety of the sketch, plan, model, article, note, document, secret official code word or pass word or information.

Although the words "secret official" are used in the section, as we have already seen, historically and grammatically these can only qualify the words "code word" and possibly "pass word". Thus all government information, whether "classified" or not, is subject to the section. This is clearly the interpretation in England of Section 2, the comparable section.[3]

The U.K. Franks Committee[4] which reported in 1972 stressed the "catch-all" nature of the section:

> The main offence which section 2 creates is the unauthorized communication of official information (including documents) by a Crown servant. The leading characteristic of this offence is its catch-all quality. It catches all official documents and information. It makes no distinctions of kind, and no distinctions of degree. All information which a Crown servant learns in the course of his duty is 'official' for the purposes of section 2, whatever its nature, whatever its importance, whatever its original source. A blanket is thrown over everything; nothing escapes. The section catches all Crown servants as well as all official information. Again, it makes no distinctions according to the nature or importance of a Crown servant's duties. All are covered. Every Minister of the Crown, every civil servant, every member of the Armed Forces, every police officer, performs his duties subject to section 2.

A former Attorney-General of England described the breadth of the English section by stating[5] that section 2 "makes it a crime, without any possibility of a defence, to report the number of cups of tea consumed per week in a government department, or the details of a new carpet in the minister's room .... The Act contains no limitation as to materiality, substance, or public interest." If we substitute "coffee" for "tea", the comment could be equally applicable in Canada.

It should be noted that the Act is also applicable to the disclosure of Provincial information because section 4 applies to information obtained "owing to his position as a person who holds or has held office under Her Majesty" and the latter phrase is defined to include "any office or employment in or under any department or branch of the government of Canada *or of any province* [6]...." There have been no reported cases relating to disclosing provincial information. It is odd that if a province wishes to use the section it would have to obtain the consent of the Attorney-General of Canada.[7]

B. *Authorized to Communicate With*

The section only permits communication to a "person to whom he is authorized to communicate with." (Note that the U.K. section uses the word "it" rather than "with", as does the remainder of the Canadian subsection. It is not clear why this change was made in the 1939 Canadian Act.)

If the section requires specific authorization in every case in which a civil servant discusses government business, then many thousands of offences would be committed every day, particularly with the great increase in consultation that has been taking place at all levels of government.[8] But the courts would no doubt interpret the section to permit some form of implied authorization. As the Franks Report states:[9]

> "Actual practice within the Government rests heavily on a doctrine of implied authorization, flowing from the nature of each Crown servant's job.... Ministers are, in effect, self-authorizing. They decide for themselves what to reveal. Senior civil servants exercise a considerable degree of personal judgment in deciding what disclosures of official information they may properly make, and to whom. More junior civil servants, and those whose duties do not involve contact with members of the public, may have a very limited discretion, or none at all."

Thus the normal process of consultation, the background briefing, or even the government authorized leak, would not contravene the Official Secrets Act.[10] Nevertheless, this aspect of the interpretation of the section is not as free from doubt as it should be and implied authorization should be specifically mentioned in the section. The Franks Report would achieve the same objective by providing a defence "that he believed, and had reasonable grounds to believe, that he was not acting contrary to his official duty."[11] Some doubts may arise because of the oaths of secrecy required under a large number of Acts which in some cases would appear to go further than the Official Secrets Act.[12] For example, under a number of Acts[13] the civil servant gives the following oath of secrecy:

> "I further solemnly swear that I will not communicate or allow to be communicated to any person not legally entitled thereto any information relating to the affairs of _____ , nor will I allow any such person to inspect or have access to any books or documents belonging to or in the possession of _____ and relating to its business."

And under the Public Service Employment Act a public servant swears that in his employment he "will not, without due authority ..., disclose or make

known any matter that comes to [his] knowledge by reason of such employment."[14] Of course these do not purport to define what might be criminal under the Official Secrets Act and the result of a breach may be only disciplinary action.

C. *Recipient of Information*

The most controversial section of the Official Secrets Act is the one that affects the Press, section 4(3). This subsection provides that

> "every person who receives any ... information, knowing, or having reasonable ground to believe, at the time when he receives it, that the ... information is communicated to him in contravention of this Act, is guilty of an offence under this Act, unless he proves that the communication to him of the ... information was contrary to his desire."

The prosecution against the Toronto *Sun*[15] was the first such prosecution against a newspaper in Canada. There have been a number in England.[16] The *Sun* was not only charged under section 4(3), set out above, but also under section 4(1)(a) which makes it an offence to communicate information "obtained in contravention" of the Official Secrets Act. It will be recalled that Judge Carl Waisberg dismissed the prosecution on both counts at the preliminary hearing stage. His ground for doing so was that the information was already in the public domain ("shopworn"). But the information had not been officially released and one wonders whether it is a correct interpretation of the section to give *carte blanche* to publish information merely because some of it has already been improperly leaked.

The recent English White Paper proposes[17] that the "mere receipt of protected information" should not be a criminal offence, but that communication by the recipient should be. This, of course, may not satisfy the Press' desire to be able to print improperly leaked information without fear of prosecution.

D. *Mens Rea*

As one finds in most statutes, the required mental element is not clearly stated. With respect to the recipient of information the section specifically uses the words "knowing, or having reasonable ground to believe, at the time when he receives it, that the ... information is communicated to him in contravention of this Act." Nothing is said, however, concerning the mental element with respect to the original communication, but it is likely that knowledge or at least recklessness would be required by the courts.[18] If the section is redrafted, the requirement of a guilty mind, by using, for example, the word knowingly, should be clearly stated in the section.

E. *American Law*

There is nothing comparable in the United States to our section 4. The issue of the disclosure of sensitive government information was, of course, raised in the *Pentagon Papers* case.[19] But the United States Supreme Court did not resolve the issue. The only proposition to command a majority of the

Court was, to quote Edgar and Schmidt's article,[20] "the naked and largely uninformative conclusion that on the record the Government had not met its heavy burden to justify injunctive relief against publication. Prior restraints, the Court reaffirmed, are available only in the most compelling circumstances."[21] The criminal liability of Ellsberg and another for taking and communicating the Papers was never tested as the case was dismissed because of government misconduct in the case.[22] Moreover, the *New York Times* and the *Washington Post*, which had published the information, were never prosecuted. However, both Justices White and Stewart issued a warning in the *Pentagon Papers* case that criminal liability could be imposed on newspapers for retaining defence secrets.[23]

The National Commission on Reform of Federal Criminal Laws (the Brown Commission) would have kept criminal prosecutions for unauthorized disclosure of government information within relatively narrow bounds. The key provision, § 1113[24] would impose liability only if the accused "knowingly reveals national security information" and not only is "national security information" specifically defined, but the offence requires that the accused act "in reckless disregard of potential injury to the national security of the United States." The later S. 1 and the Nixon Bill, S. 1400, went much further. They would have made unauthorized disclosure of "classified information" a felony and it would have been no defence that the information was not lawfully subject to classification, although a government agency was to be set up which would certify that the information had, in fact, been lawfully classified.[25]

F. *Conclusion*

There is no question that section 4 is too wide and imposes criminal liability in many unnecessary cases. Most of these cases could be handled as they now are by disciplinary action. The proposal in the U.K. White Paper limiting criminal liability to a narrow range of cases in a new Official Information Act makes good sense.[26] The Mackenzie Report also recommended that the Official Secrets Act be restricted in its application although not to the same extent as the White Paper. The Report would use the Act only for classified information but would accept the Minister's classification.[27]

This is not the place to analyze in detail the contents of an Official Information Act. Such an Act would specify what types of government information would be subject to criminal penalties for improper disclosure. It would probably also contain definitions of the government's classification system.[28] The two, i.e., the classification system and criminal penalties for improper disclosure, would be related, but not necessarily co-extensive. The Franks Committee had made recommendations with respect to criminal liability. The U.K. Government White Paper in general adopted the Franks Committee Report. The White Paper would not, however, use the criminal law in a number of areas proposed by the Franks Committee, such as improper disclosure of the value of sterling and most Cabinet documents,[29] but would extend criminal liability in other areas such as confidences held by, and not as

the Franks Committee had recommended[30] just to confidences given *to*, the government. The White Paper recommended that the criminal law be used to protect government information relating to defence and internal security, international relations, law and order, and confidences of the citizen, which had all been recommended by the Franks Committee, and added a further category, intelligence and security.[31]

Criminal liability for disclosure of information, according to the U.K. White Paper, would not be uniform and would vary from category to category. In the case of defence, internal security and international relations, criminal liability would be restricted to the disclosure of information which would "seriously damage" the interests of the state (i.e., the "secret" classification), whereas all confidences held by the government would be protected whatever harm their disclosure might cause. In the case of security and intelligence information the White Paper concludes[32] that "information relating to security and intelligence matters is deserving of the highest protection whether or not it is classified." "This is pre-eminently an area", states the White Paper,[33] "where the gradual accumulation of small items of information, apparently trivial in themselves, could eventually create a risk for the safety of an individual or constitute a serious threat to the interests of the nation as a whole."

The Franks Committee had recommended the creation of an offence of using official information for private gain, but the White Paper felt that this subject should be reserved for legislation on corruption.[34]

One key question is whether a court should be able to review the classification given to a document. In the past this has not been an issue in Canada or England because all government information, whether classified or not, is covered by the Act. The Mackenzie Commission had recommended that in any new legislation the Minister's designation be conclusive.[35] The Franks Committee also took the position that decisions about classification should be reserved to the Government.[36] The Franks Committee did, however, recommend a safeguard[37] which required the appropriate Minister to certify that "at the time of the alleged disclosure" (as distinct from the time of classification) the information was properly classified. We will leave until a later discussion the question whether this is a desirable position. At this point it should be noted that involving the courts would not be administratively difficult, nor expensive, as it arguably might be with respect to involving the courts in exemptions under a Freedom of Information Act, because the number of prosecutions would not be great. Moreover, in many cases the sensitive information would already have been made public through the leak and so the problems inherent in secret trials would not have to be faced.

II. Special Demands for Government Information

In this section we look at the special demands for government information by various persons and institutions in society to see what rules now apply and should apply to them. We start with the demand by a court through a subpoena or other court order for government information.

A. *Courts and Other Fact-Finding Bodies*

When the government wishes to prevent information from being used in court it claims what is normally called in Canada "Crown Privilege," what is coming to be known in England as "public interest privilege,"[1] and what is called in the United States "Executive Privilege".[2] In the U.S. "Executive Privilege" also refers to the executive's claim to prevent documents from being demanded by the Legislature.[3] In the Anglo-Canadian Parliamentary system a conflict between the executive and the Legislature will seldom arise because the government is controlled by the Party with a majority in the House of Commons. This area will be discussed more fully in a later section.

"Crown Privilege" with respect to a claim by the Federal Government is now contained in section 41 of the Federal Court Act,[4] first enacted in 1970. This section reads as follows:

> 41. (1) Subject to the provisions of any other Act and to subsection (2), when a Minister of the Crown certifies to any court by affidavit that a document belongs to a class or contains information which on grounds of a public interest specified in the affidavit should be withheld from production and discovery, the court may examine the document and order its production and discovery to the parties, subject to such restrictions or conditions as it deems appropriate, if it concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the public interest specified in the affidavit.
>
> (2) When a Minister of the Crown certifies to any court by affidavit that the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada, discovery and production shall be refused without any examination of the document by the court.

Subsection (1) codified the existing law.[5] If a claim for non-disclosure is made by a Cabinet Minister's affidavit the court may examine the document in question and order its production if the court concludes "that the public interest in the proper administration of justice outweighs in importance the public interest" in non-disclosure.

Subsection (2), however, would seem to have gone beyond existing law[6] in stating that the court could not examine the document and therefore must treat the claim for non-disclosure as absolute whenever the Minister states that production "would be injurious to international relations, national defence or security, or to federal-provincial relations" or would disclose a Cabinet document. The House of Lords in *Conway* v. *Rimmer*[7] and the Supreme Court of Canada in *Snider*[8] and *Gagnon*[9] had clearly stated that the judge had the right to examine the documents, even though in cases of national security he would almost invariably accept the Minister's claim, as the House of Lords did in 1942 in *Duncan* v. *Cammell Laird*.[10] In *Duncan* the plaintiff wanted the Crown to produce in wartime[11] plans of a submarine (the "Thetis") which had sunk with great loss of life, including a relative of the plaintiff. Even in the *Duncan* case Viscount Simon had stated:[12] "Although an objection validly taken to production, on the ground that this would be injurious to the public

interest, is conclusive, it is important to remember that the decision ruling out such documents is the decision of the judge." Moreover, Viscount Simon limited his judgment to civil cases, stating[13] that the principle to be applied in "criminal trials where an individual's life or liberty may be at stake, is not necessarily the same" as that to be applied in civil cases.

In *Conway* v. *Rimmer* the House of Lords held that the Court had the right to inspect the documents, although they probably would not insist on doing so in a case such as *Duncan*.[14] But there is a great difference between saying, as Lord Simon did in a recent English House of Lords decision, that in certain cases "a ministerial certificate will *almost always* be regarded as conclusive"[15] and the Canadian position in the Federal Court Act that in certain cases the certificate will *always* be regarded as conclusive. The word "almost" provides the safeguard against abuse of the claim of Crown Privilege.

The claim could be easily abused because of the potentially wide-embracing scope of the concepts of national security and federal-provincial relations. An attempt was made to delete "federal-provincial relations" from the clause when the legislation was before the House on the ground, to quote Andrew Brewin,[16] that "after all, practically every subject of concern to government affects federal-provincial relations in some way." The Law Reform Commission in the comments on their proposed Evidence Code rightly concludes[17] that "the present law should be changed. A judge, because he is impartial with respect to the matter, is in a much better position to weigh the competing interests."

The Law Reform Commission of Canada's proposed Evidence Code provides a reasonable compromise between absolute Crown Privilege and allowing any judge to inspect the documents — and it should be remembered that the question of Crown Privilege can come up before Provincially appointed judges or even justices of the peace. Section 43 of their draft Code provides that if privilege is claimed by the Crown the Court will determine (obviously after inspection of the documents, if this is necessary) whether "the public interest in preserving the confidentiality of the information is outweighed by the public interest in the proper administration of justice." The Section goes on to state that whenever the Crown claims a privilege for a state secret, which is defined to include the matters now covered by the present section 41(2), "the judge may, in lieu of determining the claim himself, and shall at the request of a party or the Crown, stay the proceedings and refer the claim to the Chief Justice of Canada, who shall designate a judge of the Supreme Court of Canada to determine the matter." (Perhaps it might be better to include the option of designating a judge of the Federal Court or of the Provincial Supreme Court.) This special review procedure is not applicable, according to the Law Reform Commission proposal, when the claim is to prevent the disclosure of "official information" as opposed to "state secrets".

The Law Reform Commission's proposed section is an improvement over section 41 of the Federal Court Act in a number of other respects. It eliminates entirely any reference to "class of documents" which had introduced a confusing element to the cases. Further, it refers to "government information",

which would include oral testimony, and not just documentary evidence to which section 41 appears to be limited. Finally, the Code makes it clear that this privilege applies "in any proceedings, whether governed by the law of Canada or a province"[18] and moreover that the rules "apply to every investigation, inquiry, hearing, arbitration or fact-finding procedure."[19] Although it was always reasonably clear under section 41 of the Federal Court Act that the present law applies to provincial courts,[20] even when administering provincial law, because the section says "any court", it was not at all clear until the Supreme Court of Canada decision in the *Keable Inquiry* case in October, 1978[21] whether section 41 applied to Commissions of Inquiry. Mr. Justice Laycraft had interpreted the term "any Court" (which is not defined) to include his own provincially appointed Commission of Inquiry, stating:[22]

> "I cannot believe that Parliament intended that where privilege is claimed on grounds of national security, for example, the Judges of the superior Courts would be precluded from examining documents which the Crown could be compelled to produce to the other tribunals.... I have concluded that it was intended that the section be effective wherever there is subpoena power."

Mr. Justice Paré in the Quebec Court of Appeal in the *Keable Inquiry* case, however, held that section 41 was not applicable to the Keable Inquiry, (but that the common law and other statutes could be relied upon to prevent disclosure).[23] Mr. Justice Pigeon, speaking for the Supreme Court of Canada, disagreed with Mr. Justice Paré's interpretation of the section, stating:[24]

> "Although this enactment is in the *Federal Court Act*, the wording makes it clearly applicable to 'any court'. This makes it applicable not only to the provincial Courts which are, in the main, Courts of general jurisdiction, federal and provincial, but also to any official invested with the powers of a Court for the production of documents."

The relationship between Crown Privilege and the Official Secrets Act was also the subject of controversy in the *Keable* case. In no previous case in Canada or England had the Official Secrets Act been used as a substitute for Crown Privilege.[25] In *Conway* v. *Rimmer*,[26] for example, the Attorney-General had stated, "The Crown does not rely on the Official Secrets Act in this specific case, though the Crown cannot give a broad blanket undertaking that it will never rely on it in a future case ...." In the *Keable* case the Official Secrets Act was raised by the Federal Government after secret information had already been given to the Commissioners. The Quebec Court of Appeal suspended the Keable hearing because, *inter alia*, disclosure of the information by the Commissioner would violate the Official Secrets Act. Mr. Justice Paré stated:[27]

> "There is no doubt that the documents with which we are concerned emanate from the R.C.M.P. They have been delivered to the Q.P.F. or the S.P.C.U.M. obviously for the purpose of collaboration ....
>
> It appears on the very face of these documents that they have been handed over as SECRET documents and that they should not be circulated without prior consent. It thus seems that members of the police forces of this Province who possess them do not have the authorization to turn them over to the Commission.

> As for the Commissioner himself, notwithstanding the powers that are conferred upon him by provincial law, I do not believe that he had the power of compelling one or other of the police officers of this Province to produce documents coming under the federal *Official Secrets Act*. As a person appointed by virtue of a provincial law, I do not consider that he has whatever authority may be required to set aside the application of a federal law respecting interests of the federal State or its security.
>
> I am thus of the opinion that these documents produced by the Q.P.F. or the S.P.C.U.M., and to which the respondent refers, have been procured contrary to law.
>
> It follows from these premises that the Commissioner does not have the right by virtue of s. 4(1) (a) to communicate the information contained in these documents to anyone unless with prior authorization."[28]

Mr. Justice Pigeon's judgment only touched on the issue. The Official Secrets Act was not excluded on these facts, but its application would have to be decided "on the merits", presumably if a prosecution were brought. Pigeon J. stated:[29]

> "Section 4 of the *Official Secrets Act* makes it clear that it is the duty of every person who has in his possession information entrusted in confidence by a Government official and subject to the Act, to refrain from communicating it to any unauthorized person. No special form is prescribed for bringing this duty to the attention of all concerned. The Commissioner certainly could not brush aside the objection because it was raised by affidavit and after he had obtained possession of the documents. Whether these were in fact subject to the Act will have to be decided on the merits."

B. *Members of Parliament*

Members of Parliament often seek information from the Government by what is called a "Notice of Motion for the Production of Papers". The Federal Government's guidelines on this question were tabled in the House in March, 1973.[30] They contain a list of 16 exemptions, including the ones set out in s. 41(2) of the Federal Court Act, that is, papers the release of which would be detrimental to the security of the State, to future foreign relations or to the conduct of federal-provincial relations, and Cabinet documents. The list also includes matters that could constitute a claim for privilege under s. 41(1) of the Federal Court Act, such as legal advice and internal department memoranda. It is the Minister and ultimately the Government that determines whether the document will be produced. Of course, non-production can be overturned by Parliament but this is not at all likely because the Government would maintain party discipline and ensure a favourable vote. If it could not, the vote could be treated as a vote of non-confidence and the Government would fall. So, in practice, the Minister has the final word. The same ability to control the outcome of a vote applies to Parliamentary Committees.[31]

The fact that the Government cannot be forced to produce documents does not mean of course that it will not voluntarily do so. The Justice and Legal Affairs Committee, for example, obtains information in closed sessions relating to security matters which would be exempt under the guidelines.[32] In the U.S. there is, as is well known, more information presented to Congressional Committees than is presently the case in Canada. For example, the

January, 1978 Executive Order set out below outlines the U.S Government's obligation to keep the Congressional Committees informed on intelligence activities:

> 3-4. Congressional Intelligence Committees. Under such procedures as the President may establish and consistent with applicable authorities and duties, including those conferred by the Constitution upon the Executive and Legislative Branches and by law to protect sources and methods, the Director of Central Intelligence and heads of departments and agencies of the United States involved in intelligence activities shall:
>
> 3-401. Keep the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate fully and currently informed concerning intelligence activities, including any significant anticipated activities which are the responsibility of, or engaged in, by such department or agency. This requirement does not constitute a condition precedent to the implementation of such intelligence activities;
>
> 3-402. Provide any information or document in the possession, custody, or control of the department or agency or person paid by such department or agency, within the jurisdiction of the Permanent Select Committee on Intelligence of the House of Representatives or the Select Committee on Intelligence of the Senate, upon the request of such committee; and
>
> 3-403. Report in a timely fashion to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate information relating to intelligence activities that are illegal or improper and corrective actions that are taken or planned.

Is a Member of Parliament in breach of the Official Secrets Act if he obtains and communicates confidential government information improperly leaked to him by, say, a disgruntled civil servant? M.P.'s are not immune from criminal prosecution; an M.P., Fred Rose, was convicted under the Official Secrets Act.[33] But an M.P. cannot be prosecuted for communicating the information in the House or in connection with his parliamentary duties (such as communicating with another M.P.). This was established in England in 1939 by the Select Committee investigating disclosure by Duncan Sandys (Winston Churchill's son-in-law) of Britain's unpreparedness for war.[34] The privilege also appears to extend to issuing a press release, but, somewhat surprisingly, there is no privilege for the Press to print it.[35] Even more surprising is the fact that the Press may not be entitled to print what is said in Parliament itself.[36] Nor would the privilege extend to a Member who actively solicited such information.[37]

The issue came up recently when the M.P., Tom Cossitt, revealed secret information in the House. The Minister of Justice, the Honourable Ron Basford, decided against prosecuting, stating[38] "by law, his statements cannot constitute the foundation for a prosecution under the Official Secrets Act since it is well established that no charge in a court can be based on any statement made by an honourable member in this House." The House had earlier established a Committee to examine the privileges and immunities of members of Parliament, including the application of the Official Secrets Act.[39]

A further question is whether the government official who passes confidential information to an M.P. violates the Act. The answer is surely yes,

although a privilege may extend to a case where the official disclosed serious criminal wrongdoing which, it can be argued, there is a duty to disclose to Parliament.[40]

C. *Individuals Affected by Information*

Many government departments and agencies keep records containing personal information about individuals. Part IV of the Canadian Human Rights Act 1977[41] now provides that the individual concerned can have access to the information kept about him.[42] Moreover, information provided by an individual to a government institution for a particular purpose can only be used for the purpose for which it was compiled unless the individual consents to another use.[43]

The Act contains exemptions from disclosure where the appropriate Minister is of the opinion that knowledge of the existence of the information "might be injurious to international relations, national defence or security or federal-provincial relations" as well as a number of other grounds, such as in the case of a sentenced prisoner revealing "information originally obtained on a promise of confidentiality, express or implied."[44] The government can even, with the approval of the Cabinet, order that information in and, possibly, the *existence* of an information bank not be published[45] as required by the Act if to do so "might be injurious to international relations, national defence or security, or federal-provincial relations ...." A number of R.C.M.P. information banks have been so exempted. The Privacy Commissioner (i.e. a designated member of the Canadian Human Rights Commission) investigates and reports on complaints that individuals are not being accorded the right of inspection to which they are entitled.[46]

One person (Bernard Maguire) who looked at his file claims that he was only permitted to do so if he signed a pledge not to reveal the contents, violation of which would result in a charge under the Official Secrets Act.[47] This procedure is not set out in the Act, nor is it included in the Regulations passed under the Act.[48]

D. *Archives Research*

A Cabinet Directive of June, 1977[49] provides that to facilitate research all departments and agencies should transfer their public records to the Public Archives of Canada "as soon as practicable." But a record is not to be transferred to the Archives if it "contains information the disclosure of which, in the opinion of the appropriate Minister, would be prejudicial to the public interest."[50] A record transferred to the Archives will be open to researchers if it is more than thirty years old[51] unless it is "an exempted record," which is defined in the Directive as a public record which, *inter alia*, "might embarrass the Government of Canada in its relations with any other government" or "might violate the right of privacy of any individual" or which "relates to security and intelligence." Exempted records in the Archives will be made available only with the consent of the appropriate Minister.[52]

Thus, some sensitive information, even if over 30 years old need not be in the Archives and even if it is placed there, need not be made available to researchers. So, for example, the papers relating to the Gouzenko inquiry, the so-called Taschereau Papers, which are now more than 30 years old, are in the Archives and have not been released on the stated ground that "the release of these papers may violate the right of privacy of many persons who testified before the Commission and who are still alive."[53]

Materials made available to the public in the Archives would obviously not be subject to the Official Secrets Act.

E. *Other Government Agencies*

The propriety and the legality of the transfer of government information from one department within government to another — or the transfer to another government — is a vast and important topic which will not be explored here. The topic is, of course, much broader than national security, the particular concern of this paper. It involves, for example, the use of health records, at present the subject of an Ontario Royal Commission, tax information, the subject of an Alberta Judicial Inquiry, and the use of unemployment insurance data.

III. Freedom of Information Laws

The previous sections looked at the claims of special users of government information — and, in particular, information relating to national security. Here we look at the claim by a member of the public, or what is more likely, a pressure group, to obtain government information. Once again, we will focus our attention on the question of national security.

At the present time there is no general right to government information, although it should be pointed out that, with the widespread increase in the process of consultation by all levels of government, there is a vast amount of government information actually published.[1] The writer has argued elsewhere[2] that there is great need for governments to assist citizens by making the information already available more widely accessible. Access to the law and freedom of information are both important goals. There is a danger, however, that the first will be overlooked because of the greater glamour in the second. Moreover, there is also a danger that providing information only to those who make a claim for it will tend to help those who are best able to help themselves, that is, the corporations[3] and the stronger pressure groups. It is important, therefore, to make sure that freedom of information laws, which should operate to help neutralize the dominance of certain pressure groups,[4] do not have the opposite effect. One solution is to ensure that any information that is made available, and that would be of general interest, is deposited in various libraries across the country at the same time that it is released to the person seeking it.

The movement for Freedom of Information laws has been growing in Canada.[5] It received impetus from the U.S. Freedom of Information Act passed in 1967[6] and the amendments to that Act passed in 1974.[7] The Canadian Government introduced a Green Paper on the topic, entitled Legislation on Public Access to Government Documents, in June, 1977, which followed a number of earlier government studies.[8] The same movement in England resulted in a Government White Paper in July, 1978, which, *inter alia*, deals with the subject of what is described as "Open Government".[9] A Report by JUSTICE has recently recommended that as a first step the Government adopt a Code of Practice (rather than legislation) to govern the actions and attitudes of all servants of the Crown.[10] Section 1 of the Proposed Code provides:

> "(1) It is essential to the effective working of a democratic society that the public should be adequately informed about the actions and decisions taken by the Government and other organs of public administration of the United Kingdom. The paramount criterion should be that the public may, by being adequately informed, have the opportunity of understanding and evaluating the nature of, and the reasons and grounds for, such actions and decisions. Accordingly, with certain necessary exceptions, all documents containing information on such matters should, so far as is reasonable and practicable, be disclosed within a reasonable time to any person requesting their disclosure."

In March 1979 the British Government issued a Green Paper entitled "Open Government"[11] which adopted the JUSTICE approach. Since then there has been a change of Government in England. The Green Paper stated:[12]

> "In the Government's judgement further steps designed to achieve greater openness must be fully in accord with our constitutional tradition and practice which have developed in this country. Nothing must be allowed to detract from the basic principle of Ministerial accountability to Parliament .... In the Government's view all these considerations point to the advantages of adopting a Code of Practice under which the Government would accept certain obligations, set out in the Code, to make information available on request."

As previously discussed, there is no direct relationship between Freedom of Information laws and the Official Secrets Act. But the Official Secrets Act has the psychological effect of creating a "general aura of secrecy"[13] so that reform of the Official Secrets Act is "a necessary preliminary to greater openness in government."[14] Moreover, the absence of a Freedom of Information law adds to the climate of secrecy.[15] These so-called "Sunshine" laws, as Freedom of Information laws are often called — to continue the "climate" analogy — will help counteract the "chilling effect" of the Official Secrets Act,[16] as well as help remove the inherent dangers in the "darkness of secrecy."[17] As David Williams has written, a Freedom of Information statute "would demonstrate that the onus of proof had changed."[18]

There is little doubt that Canada will have a Freedom of Information Act. The former Secretary of State told the House at the end of June, 1978 that the Government is "committed to bringing forward in the next session effective freedom of information legislation,"[19] and the Speech from the Throne delivered on October 11, 1978 stated that in the new session the House "will be asked to consider proposals to increase public access to government infor-

mation."[20] Legislation was about to be introduced when the election was called and Parliament was dissolved.[21] The then Leader of the Opposition, Joe Clark, had been pressing for such legislation[22] and campaigned on the promise of introducing a Freedom of Information Act. As Prime Minister he will almost certainly attempt to fulfil this promise.

There are two key issues that will undoubtedly continue to be the subject of considerable debate — even after legislation is enacted: the scope of the exemptions under the Act and the body that is to have the final say on whether a document should be exempt. A further important issue which has recently surfaced in England is the extent to which any scheme should have retrospective effect.[23]

A list of possible exemptions is set out in the Canadian Government Green Paper.[24] The list includes the exemption of "documents, the disclosure of which, or the release of information in which, might (i) be injurious to international relations, national defence or security or federal-provincial relations ...." The Green Paper was studied by the Standing Joint Committee on Regulations and Other Statutory Instruments, which reported at the end of June, 1978.[25] The Committee found that the list of proposed exemptions in the Green Paper "is far too broad and ill-defined." They recommended the elimination of the term "national security" as "too imprecise",[26] relying instead on a more specific law enforcement exemption to provide protection; favoured the use of examples for terms such as "national defence" which would not confine the exemption to the examples given;[27] and substituted for the phrase "might be injurious," the phrase (borrowed from U.S. law)[28] "could be reasonably expected to be detrimental." The Green Paper's exemption ("might be injurious to international relations, national defence or security or federal-provincial relations") was taken from section 41(2) of the Federal Court Act; but note that in that Act the exclusion applies only if the document "would be injurious", not if it "might be injurious."[29]

The Green Paper raises the question[30] whether a claim in the category drawn from section 41(2) of the Federal Court Act should, as in that Act, be conclusive. A distinction would be drawn between these very sensitive matters and other claims for information. The Green Paper states:[31] "Given that this distinction has received the approval of Parliament in relation to the production of documents relevant to cases before the courts, it might seem appropriate that it be incorporated within [a Freedom of Information statute.]"

The 1967 U.S. Freedom of Information Act had included what amounted to a conclusive exemption by permitting information to be withheld if "specifically required by Executive Order to be kept secret in the interest of national defence or foreign policy."[32] The Supreme Court of the United States held in 1973 in *Environmental Protection Agency* v. *Mink*,[33] a case in which Congressman Mink and others tried to obtain a report concerning an atomic test on Amchitka Island in Alaska, that the Courts could not go behind a classification made pursuant to the applicable Executive order. After the *Mink* decision, and in the light of the post-Watergate concern about executive claims to privilege, Congress overrode a Presidential veto and amended the Freedom of

Information Act to permit the Courts to examine the documents *in camera* to determine whether they "are in fact properly classified pursuant to such Executive order."[34] The Executive has gone even further in this direction and has interpreted the legislation as requiring a proper classification at the time of the hearing as well as at the time of the actual classification.[35]

The central issue in any discussion of Freedom of Information legislation is whether the Courts should be able to overturn an executive determination that a document fits one of the stated exemptions. The 1974 U.S. Amendments allowed the courts to do so. It is unlikely that a similar approach will be taken in England where the Government White Paper states:[36]

> "In order to achieve the reasonable objectives of open government in the British context, where the policies and decisions of the executive are under constant and vigilant scrutiny by Parliament and Ministers are directly answerable in Parliament, it may be neither necessary nor desirable to proceed to legislation of a kind which may be justifiable in other and often very different contexts — for instance, that of the United States."

Nevertheless, the White Paper states that "this is a matter on which the Government has come to no conclusion and has an open mind." In the recent Green Paper the then Government took a firmer position, stating,[37] "it would be a constitutional novelty for this country if the provision of information in general policy areas, with their largely political content, were made a matter for legal or quasi-legal judgement rather than of accountability to Parliament."

The Canadian Green Paper also does not favour letting the courts resolve conflicts, stating:[38]

> "Under our current conventions, it is the Minister who must remain responsible for deciding whether to refuse or grant access to documents and this responsibility is a constitutional one owed to his Cabinet colleagues, to Parliament, and ultimately to the electorate. A judge cannot be asked, in our system of government, to assume the role of giving an opinion on the merits of the very question that has been decided by a Minister. There is no way that a judicial officer can be properly made aware of all the political, economic, social and security factors that may have led to the decision in issue. Nor should the courts be allowed to usurp the constitutional role that Parliament plays in making a Minister answerable to it for his actions."

Both the Canadian[39] and the U.K.[40] Papers were concerned about the high cost of using the courts and the Canadian Green Paper also raises the question[41] of the "enormous caseload to which the courts might be subjected."

The Canadian Green Paper outlines a number of possible options, including judicial review, Parliamentary review, a government-appointed Information Commission with advisory powers or a Commissioner with powers to order release.[42] Although no specific preference is set out, it appears as if the drafters favoured using an Information Commissioner with advisory powers only. Similarly, a recent report by the U.K. group, JUSTICE, recommended that the Parliamentary Commissioner (better known as the Ombudsman) police the Code of Practice which they advocate be adopted.

Failure to disclose documents which ought to be disclosed would be treated as an act of maladministration.[43] The U.K. Green Paper did not even want to go this far.[44]

The Canadian Bar Association, relying heavily on Professor Murray Rankin's valuable study,[45] strongly supports the use of the courts:[46] "the Canadian Bar Association is unequivocal in its support of the use of the courts in the final resort." The present Prime Minister, Joe Clark, had expressed a similar view when, as leader of the opposition, he stated that the court is "a viable, impartial social institution to check possible abuses of executive power".[47] The Report of the Standing Joint Committee on Regulations and Other Statutory Instruments[48] had recommended[49] in June, 1978 that there should be an appeal from a government-appointed Information Commissioner to a judge selected from a special panel of judges from the Trial Division of the Federal Court, with a right of appeal to the Federal Court of Appeal, and a further appeal, with leave, to the Supreme Court of Canada. If judicial review is chosen as the model this is a sensible approach permitting a limited number of judges to develop expertise in the area[50] and also preventing the inconsistency of result that might follow if all superior courts across Canada were used.[51]

The question of whether it is sound to use the judiciary to deal with these questions will be discussed in a later section.

IV. Conclusion

This analysis of Government Information indicates that steps should be taken to co-ordinate the various statutes and regulations dealing with government information. The Official Secrets Act should be amended to narrow its scope from its present wide compass to the improper revelation of serious matters. Moreover, it should be made clear that it is not a breach of the Official Secrets Act to divulge government information if there is implied authority to communicate it. Changing the Official Secrets Act is a necessary psychological precursor to open government.

Freedom of Information laws, as most observers agree, should be enacted, with carefully limited exemptions and a method of testing the government's claim for an exemption. Whether it should also involve recourse to the courts will be discussed in the final section of this paper. The exemptions should, of course, be logically consistent with, although not necessarily the same as, other cases involving claims to exemption from disclosing government information, such as Crown privilege and Parliamentary Production of Papers. A further area which requires clarification involves disclosure of information from one department to another.

Rules relating to the above areas could be set out in a Government Information Act which should also include procedures for classifying documents. The criminal penalties involving improper disclosure could be in the Government Information Act or, preferably, in the Criminal Code. The Official Secrets Act could therefore be repealed.

Part Four
POLICE POWERS AND NATIONAL SECURITY

Are the powers of the police the same in national security matters as they are in the ordinary criminal law? This question is explored in this Part. The answer will be a lengthy one because it will be necessary to look at inexact doctrines such as necessity and superior orders, concepts such as "act of State" and the "Royal Prerogative" which rarely raise their heads in criminal matters, and specific statutory differences, as, for example, in wiretapping. Moreover, we must look at emergency powers such as the War Measures Act[1] and the role of the military in the area of internal security. Police powers are notoriously obscure.[2] As we will discover, they are even less clear in matters connected with national security. Throughout the discussion an analysis will be made of what the law should be with respect to police powers in this area.

A preliminary issue should first be examined: that is, whether those involved in national security matters are peace officers and therefore have police powers. In Canada the main burden with respect to national security falls on the R.C.M.P. Security Service[3] and those that are members of the Force[4] are, of course, "peace officers" both by virtue of the R.C.M.P. Act[5] and the definition of peace officer in the Code itself.[6] Thus they can exercise all the powers of a peace officer both under the Code and at common law, although recently they have used the Criminal Investigation Branch (C.I.B.) of the R.C.M.P., rather than directly exercising the power themselves. Others involved in national security, such as the Police Security Planning and Analysis Group in the Solicitor General's Department[7] and the military would not have any special police powers; however if a member of the armed forces is acting under military law[8] or employed on duties designated by a Cabinet regulation made under the National Defence Act as requiring the powers of a peace officer, then he would be a peace officer under the Criminal Code.[9]

In England, the security service, commonly known as MI5, is not part of a police force, and so, as Lord Denning stated in his Report on the Profumo Scandal:[10]

> The members of the Service are, in the eye of the law, ordinary citizens with no powers greater than anyone else. They have no special powers of arrest such as the police have. No special powers of search are given to them. They cannot enter premises without the consent of the householder, even though they may suspect a spy is there. If a spy is fleeing the country, they cannot tap him on the shoulder and say he is not to go. They have, in short, no executive powers.

The Security Service in England is forced, therefore, to work closely with the police and, in particular, with what is known as the "Special Branch" of the Metropolitan Police.[11]

I will leave to others the difficult question of whether it is better to have the security service operate as part of a police force as in Canada and the U.S.A. (the F.B.I.) or whether it is better to have a security service separate from the regular police. The Mackenzie Commission thought the latter was preferable for several reasons, including the far from convincing ground that security services may engage in illegal activities and regular police work should be protected from such tarnishment.[12] Other arguments in favour of separation included the ability to recruit from outside the pool of talent available to the R.C.M.P.[13] An understanding of the recruitment and training procedures of the Force is obviously necessary before such questions can be properly answered.

Before turning to specific police powers such as arrest and wiretapping, some concepts relating to the extent to which the government must obey the law are explored. This differs from the defences to and justifications for apparent excesses which are explored in a later section. Here we explore whether the Crown has powers not found in legislation or the common law.

Three separate but interrelated concepts must be explored, the Royal Prerogative, the "act of State" doctrine and the rule that the Crown is not bound by statutes.

The Royal Prerogative consists of those legal attributes recognized by the common law as inherent in the Crown, i.e. the executive, that are not expressly or impliedly covered by legislation.[14] As Lord Dunedin stated in the House of Lords, adopting Dicey's definition,[15] the prerogative is "the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown."[16] The prerogative is still crucial in a number of areas and is the basis for declaring war, entering into treaties, and for the deployment of the armed forces.[17] It was the subject of House of Lords decisions on the right of the Government to take over a hotel without compensation during the First World War,[18] and the right to destroy oil fields in Burma without compensation in the Second.[19] In Canada, the prerogative has been involved in less weighty questions such as the granting of Q.C. s[20] and (the bane of all law students) the right to incorporate companies by letters patent.[21]

So the prerogative is important in areas of defence and international relations. The prerogative is even used as the basis for spy-swapping.[22] If it can be used for these matters, can it be used internally to justify police activities? The answer is surely that it cannot.[23] In the first place Parliament has taken over much of criminal law and procedure through legislation — so much so that the judiciary in Canada and England no longer can create new common law offences[24] — and thus whatever prerogative there was, now no longer exists. As Lord Parmoor stated in 1920 in the House of Lords[25] "The constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject." Secondly, however, even

without legislation, the prerogative would have been held to have been controlled by and submerged into the common law.[26] Thus, in the early 17th century the courts denied any prerogative right of the King to administer justice in person[27] or to create new offences by proclamation.[28] Further, the King's power to suspend the operation of the law was declared illegal in the Bill of Rights in 1689.[29]

In the next century the important case of *Entick* v. *Carrington* (1765)[30] held that search warrants could not be authorized by a Secretary of State, but only by a judicial officer. Secretaries of State had been issuing such warrants for 80 years and did so in this case to search Entick's house for what were described as "very seditious papers ... containing gross and scandalous reflections and invectives upon His Majesty's Government and upon both Houses of Parliament."[31] Lord Chief Justice Camden stated:[32] "we can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society, for papers are often the dearest property a man can have." In answer to the view that such a power is necessary, the Chief Justice stated:[33] "If the Legislature be of that opinion they will make it lawful."

The Royal Prerogative concerning the administration of justice has not died quietly, however. It was suggested in England in a Report by a Committee of Privy Councillors in 1957[34] as a basis for justifying mail opening and wiretapping. This Report, known as the Birkett Report, recommended that the Home Secretary continue to issue warrants authorizing opening of mail and also wiretapping. The Home Secretary argued that the power was based on the Royal Prerogative extending back well over 200 years.[35] It was necessary to stress the prerogative because if the basis was simply the language of the Postal Act then it would not apply to telephones. A power to open mail was specifically recognized in successive Postal Acts. The U.K. Post Office Act prohibited the opening of a postal packet (which included a letter) "in course of transmission by post."[36] The section went on to state, however, that "nothing in this section shall extend to the opening, detaining or delaying of a postal packet ... in obedience to an express warrant in writing under the hand of a Secretary of State."[37] The Birkett Committee was obviously sympathetic to the view that the power to intercept rested on the prerogative, stating:[38] "We have been impressed by the fact that many Secretaries of State in many Administrations for many years past have acted upon the view that the power to intercept communications was in the nature of a prerogative power." But in the end the Committee did not decide the source of the power and simply said,[39] "We favour the view that it rests upon the power plainly recognized by the Post Office statutes as existing before the enactment of the statutes, by whatever name the power is described."[40]

This conclusion, however desirable, is inconsistent with *Entick* v. *Carrington*.[41] In order to distinguish the *Entick* case the Committee did not read it as banning search warrants by the Secretary of State, but rather in banning the practice of issuing *general* warrants.[42] Having read *Entick* v. *Carrington*[43] in this way it was easy to accept the Home Secretary's argument that

"there is a distinction to be drawn between the general warrants condemned by Lord Camden, and the limited, strictly governed use of the Secretary of State's warrant" in these cases.[44]

In Canada no official attempt has been made to justify mail opening on the basis of a prerogative power. It would be difficult to do so because our Post Office Act[45] does not clearly acknowledge the existence of a right to open mail and s. 58 specifically makes it illegal. Our section is not an absolutely clear prohibition, however, because it uses the word "unlawfully", thereby suggesting that some mail openings may be lawful.[46] Although an argument (not a particularly strong one) could have been made that there was such a power in the years before and after Confederation in connection with the post office, and in later years a very weak one that it still existed, the fact that it was never claimed is evidence that it no longer exists. This could be an example (assuming the power was there at one time) of that "strange creature" described by Professor de Smith[47] as a "vanishing prerogative." It is more satisfactory, though, to conclude that for Canada the prerogative, if it existed — and no doubt it did exist in Canada in the first half of the 19th century when we were governed by Imperial legislation — was excluded by the language of our Post Office Act. We will return to the subject of mail openings in a later section.

"Act of State" is a concept which developed in civil cases, but may also be applicable in criminal cases.[48] Stephen defined it as "an act injurious to the person or to the property of some person who is not at the time of that Act a subject of Her Majesty; which act is done by any representative of Her Majesty's authority, civil or military, and is either previously sanctioned or subsequently ratified by Her Majesty."[49] Whatever defence there may be to illegal acts committed outside of Canada, the "act of State" doctrine would not be available as a defence to an illegal act committed by the police or the security service in Canada, certainly not if committed against a Canadian subject.[50] As Laskin J.A. (as he then was) stated in the Ontario Court of Appeal:[51]

> "In principle, the recognition of 'public duty' to excuse breach of the criminal law by a policeman would involve a drastic departure from constitutional precepts that do not recognize official immunity, unless statute so prescribes .... Legal immunity from prosecution for breaches of the law by the very persons charged with a public duty of enforcement would subvert that public duty."

Another distinct feature of the prerogative is the rule that the Crown is not bound by a statute unless expressly named therein or included by necessary implication.[52] This concept is parallel to, but wider than, that of the relationship between legislation and the Royal Prerogative mentioned earlier. In Canada the rule is embodied in s. 16 of the Interpretation Act[53] which states that "[n]o enactment is binding on Her Majesty or affects Her Majesty ... except only as therein mentioned or referred to." It is clear, however, that the Criminal Code applies to Her Majesty and Her Majesty's servants and agents,[54] and consequently s. 16 cannot grant immunity from the criminal law to representatives or servants of the Crown.[55]

Thus, there are no legitimate grounds for suggesting that the security service, or the ordinary police, are not, at least while operating within Canada, subject to the law. But it is not always easy to determine what the law is. Not all defences are set out in the Code. Section 7(3) of the Code provides that "Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force ... except in so far as they are altered by or are inconsistent with this Act ...." Defences will be explored in a later section. Not only are the courts able to develop common law defences, they also develop common law powers in relation to police practices. So, for example, in *Rex* v. *Brezack*[56] the Ontario Court of Appeal without any specific legislation on the topic upheld the right of a peace officer to insert his finger inside the accused's mouth to search for narcotics as part of the process of arrest; and in *Levitz* v. *Ryan*[57] the same court held that a peace officer conducting a search under a writ of assistance could "freeze" the premises and its occupants in order to accomplish the search. Similarly, the Supreme Court of Canada in *Eccles* v. *Bourque*,[58] again without specific legislation, held that a peace officer could trespass on a third person's property to arrest an accused. In other words, the courts have been construing the existing legislation to help the police carry out their duties, though it should be noted that some commentators have argued that the police are receiving too much help from the Supreme Court of Canada.[59] For our purposes, though, the main point is that "the law" is not just the bare legislation, but also the manner in which the courts flesh it out.

I. Arrest and Search

The special powers of arrest and search available under the Official Secrets Act[1] were discussed in an earlier section. Section 16, the 1974 amendment to the Act, will be dealt with in detail later. There are no common law powers of arrest and search; they are all found in the Criminal Code (including, as we have seen, the common law extension of these powers established by the judiciary) and other statutes such as the Narcotic Control Act[2] and the Official Secrets Act. This section will examine various search powers in relation to national security matters.

Writs of assistance, first found in legislation in England in the 17th century in relation to customs matters,[3] are blanket search warrants granted in Canada under four Federal statutes,[4] but are not directly available in national security matters. They are designed to permit searches under these specific statutes without judicial authorization (although the writ itself must be judicially authorized), but even when they are permitted the officer must in the individual case reasonably believe that an offence has been committed.[5]

A. *Surreptitious Entry*

For over twenty years the R.C.M.P. Security Service has used the practice which it calls "surreptitious entry."[6] According to the R.C.M.P. Security Service's public statement on surreptitious entry,[7]

> Surreptitious Entry is an investigative practice which the RCMP Security Service has and does utilize in investigations relating to subversion, terrorism and activities of foreign intelligence agents in Canada. This practice has been utilized on a selective basis in excess of twenty years.
>
> Defined in Security Service terms, a Surreptitious Entry must be secret or clandestine in nature and it must be conducted without the knowledge of the target (object) of the investigation.
>
> The purpose for such an entry is to intercept documentary and physical intelligence or to install long term or short term technical devices, pursuant to a Warrant issued under the provisions of Section 16(2) of the Official Secrets Act.

The Public Statement of July, 1978 provides the following statistics: since 1971 there were 47 entries to intercept documentary or physical intelligence, 223 installations of long-term technical devices, and 357 installations of short-term technical devices. Not all of the cases in the latter two categories involve surreptitious entries. According to the Statement, a review of the 223 long-term technical installations indicates 55 instances of entry.

We will turn to an analysis of s. 16 in a moment, but first let us look at what justification there could be for such entries before 1974.

Prior to the 1974 Amendment, if there were reasonable grounds for suspecting that a breach of the Official Secrets Act had occurred or was about to occur, then, as we have seen, a justice of the peace would issue a search warrant, or a high-ranking R.C.M.P. officer could do so under s. 17 of the R.C.M.P. Act. There is even a respectable argument that s. 11 of the Official Secrets Act is wide enough to cover wiretapping, an argument which will be referred to in a moment. But however wide s. 11 of the Act is, it is not wide enough to cover most cases of domestic dissidents who are not attempting to obtain government information.[8]

The crucial question of the legality of surreptitious entries will be examined in detail when we look at "defences". Possible offences will be mentioned in a later section. A separate problem which requires further discussion later is that of whether a surreptitious entry can be made if there is, in fact, a warrant for electronic surveillance.

B. *Security Service's Policy on Surreptitious Entry*

The Security Service's policy on the authorization of these "entries" without warrant is set out in the July 1978 Public Statement on Surreptitious Entry.[9] Prior to 1959 they were done without any authorization from Headquarters in Ottawa. In that year, after a short ban on entries for the purpose of obtaining documentary or physical intelligence, approval had to come from the Director of Security and Intelligence in Ottawa. This approval was not necessary, however, for short-term electronic surveillance. Between 1966 and 1969 there was another ban on entry to intercept documentary and physical intelligence.[10] This was reinstated in 1969 and in 1971 it was extended so that emergency entries were permitted in these cases without Headquarter's consent. These shifts in policy on authorizations certainly indicate an uneasiness and uncertainty about these activities. In 1974 s. 16 of the Official Secrets Act

was passed to clarify their operations. But as we will see, it has spawned a large number of additional problems.

C. *Wiretapping and Section 11 of the Official Secrets Act*

Could a warrant under section 11 justify wiretapping?[11] S. 11 reads as follows:

> 11. (1) If a justice of the peace is satisfied by information on oath that there is reasonable ground for suspecting that an offence under this Act has been or is about to be committed, he may grant a search warrant authorizing any constable named therein, to enter at any time any premises or place named in the warrant, if necessary by force, and to search the premises or place and every person found therein, and to seize any sketch, plan, model, article, note or document, or anything that is evidence of an offence under this Act having been or being about to be committed, that he may find on the premises or place or on any such person, and with regard to or in connection with which he has reasonable ground for suspecting that an offence under this Act has been or is about to be committed.
>
> (2) Where it appears to an officer of the Royal Canadian Mounted Police not below the rank of Superintendent that the case is one of great emergency and that in the interest of the State immediate action is necessary, he may by a written order under his hand give to any constable the like authority as may be given by the warrant of a justice under this section.

If the answer is yes, then either Chief Justice McRuer's judgment in the 1947 case of *Re Bell Telephone Company of Canada*[12] was wrongly decided or else the scope of warrants under section 11 of the Official Secrets Act is wider than under the search warrant provisions of the Code. In the *Bell Telephone* case the police as part of a test case[13] obtained a warrant from a Justice of the Peace permitting them to tap the telephone lines[14] to and from a place which the police believed was involved in illegal bookmaking. Chief Justice McRuer quashed the warrant stating[15] that "the purpose of the search warrant is to secure things that will in themselves be relevant to a case to be proved, not to secure an opportunity of making observations in respect of the use of things, and thereby obtain evidence." This judgment, as far as can be seen, stood unchallenged by the Crown in every jurisdiction in Canada until the wiretapping legislation in 1973 permitted legitimate wiretapping and thus made the question no longer of practical importance. Can the Official Secrets Act legislation be distinguished from the search warrant provisions in section 443 of the Code? It is not easy to do so because in both cases the police are authorized to "seize" the evidence and it is not possible to seize a conversation. It is true, as we saw in the discussion of the Official Secrets Act, that section 11 differs in several respects from section 443: by using the concept of suspicion rather than belief; by permitting a search when an offence is about to be committed; and by not requiring the police to "carry it before the justice", as the Code does. But these would not appear sufficient to distinguish the *Bell Telephone* case. Another distinction is that the Official Secrets Act makes communication in many cases an offence; but not all Official Secrets Act offences involve communication, and many Criminal Code offences do as well, including the bookmaking offence that was the very subject of the warrant in the *Bell Telephone* case. Moreover, the purpose of most surreptitious entries in the espionage

fields is not to collect evidence for prosecutions but, to quote the R.C.M.P. Security Service's Public Statement,[16] to enable "the Security Service to quietly identify and exploit hostile intelligence vulnerabilities" as well as "to discern which foreign missions engage in inappropriate intelligence activities in this country ...."[17] It is, however, possible to conceive of cases under section 11 — and this would be true of the Code as well[18] — where the police know that a particular conversation is about to take place and obtain a warrant for that purpose. In such cases the justification for using section 11 would be stronger. But the lengthy taps for purposes of surveillance which the Security Service would want would not fit within this category. So, even though what may be characterized as a "respectable" argument can be made that the Official Secrets Act should be interpreted differently from the Code, it would have been unlikely that the Courts would have accepted such a distinction. It should be noted that England has a section almost identical to our section 11 and it was not relied upon or even mentioned as a justification for wiretapping in the 1957 Birkett Report, which did deal with taps for security purposes.

II. Surveillance Under Section 16 of the Official Secrets Act

Section 16 of the Official Secrets Act, which allows for the interception and seizure of communications with a Solicitor General's warrant in certain cases involving national security, became law in June, 1974 at the same time as the wiretapping law — named, or, arguably,[1] misnamed, the Protection of Privacy Act — came into force. The wiretapping law was designed to control improper electronic surveillance and at the same time to make it clear that in certain circumstances wiretapping and other forms of electronic surveillance were permitted. Before then the legality of wiretapping was said not to be clear.[2] It was clear, however, that wiretapping was taking place.[3] The U.S. had introduced wiretapping legislation in 1968,[4] and the Ouimet Committee in 1969,[5] as well as the Justice and Legal Affairs Committee in 1970,[6] recommended that comparable legislation be enacted in Canada. Legislation was introduced in 1972,[7] but the legislation was not enacted before dissolution of Parliament. A further Bill was introduced in 1973[8] and was enacted by Parliament after a number of amendments were made by the Standing Committee on Justice and Legal Affairs. An attempt by the Senate to make changes in the Bill as passed by the House was unsuccessful. The Act came into force on June 30, 1974. Further changes were proposed in 1976,[9] the so-called "Peace and Security" legislation, but these were not enacted before Parliament was prorogued in October, 1976. Finally a new Bill[10] was introduced in April 1977 and was passed by Parliament in August 1977.[11]

The Mackenzie Commission reported at about the same time as the Ouimet Committee and had no doubt that electronic surveillance was necessary in security matters. "In the security context", stated the Mackenzie Commission,[12] "we see no reason to differ from the conclusions of the British

Committee of Privy Councillors which examined this general subject in 1957." The British Committee (the Birkett Committee) had stated that "the problems of national security are such that no reasonable weapon should be taken from the hands of those whose duty it is to watch over all subversive activities in the safeguarding of British Interests."[13]

Both the Ouimet and Mackenzie Committees agreed that electronic surveillance in national security matters should be handled differently from that dealt with in connection with criminal matters. The Ouimet Committee considered[14] "that wiretapping and electronic eavesdropping in matters affecting national security is within the sphere of the executive branch of government." The Mackenzie Commission stated:[15] "We think it important that any such legislation should contain a clause or clauses exempting interception operations for security purposes from the provisions of the statute" and further that "control should be ministerial rather than judicial." Electronic surveillance in national security matters was, in line with these studies, therefore handled separately with separate procedures set out in section 16 of the Official Secrets Act.[16] Section 16 reads in part as follows:

> 16. (2) The Solicitor General of Canada may issue a warrant authorizing the interception or seizure of any communication if he is satisfied by evidence on oath that such interception or seizure is necessary for the prevention or detection of subversive activity directed against Canada or detrimental to the security of Canada or is necessary for the purpose of gathering foreign intelligence information essential to the security of Canada.
>
> (3) For the purposes of subsection (2), "subversive activity" means
>
> (a) espionage or sabotage;
>
> (b) foreign intelligence activities directed toward gathering intelligence information relating to Canada;
>
> (c) activities directed toward accomplishing governmental change within Canada or elsewhere by force or violence or any criminal means;
>
> (d) activities by a foreign power directed toward actual or potential attack or other hostile acts against Canada; or
>
> (e) activities of a foreign terrorist group directed toward the commission of terrorist acts in or against Canada.

A. *Notice*

One obvious difference in procedure is with respect to notice of the wiretap. Under the Criminal Code[17] notice must be given to the person whose telephone has been tapped or place has been bugged ninety days after the surveillance has ended. This is a desirable technique for limiting the extent of police wiretapping. But the Security Service cannot, without serious international repercussions, notify a foreign government that the Government has been bugging its embassy. So the Code exempts these cases from the disclosure requirement.[18] The Official Secrets Act covers, however, a much wider area than the bugging of members of foreign embassies and consulates. As we shall see, it involves, for example, "sabotage" and solely internal subversive "activities directed toward accomplishing governmental change within Canada or elsewhere by force or violence or any criminal means." There is no reason why notice of wiretapping should not be given to such persons. There can be no

"official" embarrassment in giving notice and it would help ensure that abuses did not take place. Of course, the Security Service would likely object to giving notice; but even with respect to wiretapping in ordinary criminal cases the police are far from happy with the notice provisions.

B. *Length of Taps*

A further difference between taps and bugs under the Code and those under the Official Secrets Act is that the former are to investigate a specific offence whereas under the Official Secrets Act the surveillance can be for broader purposes such as "gathering foreign intelligence information essential to the security of Canada."[19] Even in relation to "subversive activity" the electronic surveillance may be for "prevention" as well as "detection." Thus the 30 day (now 60 day) limit on taps[20] under the Criminal Code may well be too short for the type of operations conducted under the Official Secrets Act. The latest Annual Report by the Solicitor General under the Official Secrets Act shows that there were 392 warrants issued in 1978 with an average length of 244.71 days.[21] In contrast, the 702 warrants issued under the Criminal Code in 1978 had an average length of 73.5 days.[22]

The Official Secrets Act Report presumably only gives the average length of time for which warrants were in force in the year 1977; it does not give the average length of time that installations have been in place. Many would be in place over a number of years, although there would be a new authorization each year. The R.C.M.P. Public Statement shows a total of 580 installations from 1971 to July, 1978,[23] but the 1977 Report shows 471 warrants issued. This can only make sense if new warrants are issued each year for the continuation of installations which are already in place.[24] If a bug is placed in an embassy one would expect it to stay in place for a lengthy period of time. But once again, this same lengthy time frame might be unreasonable for internal subversive operations for which a time limit closer to that found in the Criminal Code might be more reasonable.[25]

C. *Report*

The Solicitor General's Annual Report under the Official Secrets Act[26] is far less detailed than the Annual Reports under the Code.[27] When the legislation was first introduced in 1972 *no* Report to Parliament was envisaged: the reporting section merely stated that "The Commissioner of the Royal Canadian Mounted Police shall from time to time make a report to the Solicitor General of Canada with respect to each warrant issued ... setting forth particulars of the manner in which the warrant was used and the results, if any, obtained from such use."[28] But the Justice and Legal Affairs Committee inserted the reporting provision which is in the present legislation.[29]

In England figures are not released. The Birkett Report had stated:[30] "We are strongly of the opinion that it would be wrong for figures to be disclosed by the Secretary of State at regular or irregular intervals in the future. It would greatly aid the operation of agencies hostile to the State if they were able to estimate even approximately the extent of the interceptions of communications

for security purposes." This only makes sense, however, if the figure is so low as not to worry those engaged in espionage activities. Perhaps this is the case in England. One English writer, C.H. Rolph, has written with respect to all cases of wiretapping:[31] "I would be extremely surprised if there were ever more than 20 or 30 such warrants in force at any one time." On the other hand, another writer, Tony Bunyan, suggests that the number of warrants is far higher[32] and that it is "most unlikely that more than a small fraction of tapping by MI5 is authorized by the Home Secretary."[33]

D. *Solicitor General's Authorization*

The main difference between the Official Secrets Act and the Code provisions is, of course, that the Solicitor General rather than a judge grants the authorization. This is in line with the Mackenzie and Ouimet recommendations which we have already seen. There is no constitutional argument in Canada, as there is in the U.S.,[34] against Parliament adopting this distinction. The question of the wisdom of doing so will be left until a later section.

Emergency taps are not provided for under the Official Secrets Act as they are in the Code. (Under the Code the emergency section provides for an expedited judicial order which will last 36 hours; it does not, as the original draft of the legislation[35] proposed, allow the police to operate in an emergency without any judicial authorization.) This may have been an oversight, although it should be noted that the procedure is simpler than under the Code where an affidavit has to be prepared.[36] Under the Official Secrets Act the information need only be "by evidence on oath" and section 16(2) would seem to provide the authority for the Solicitor General to administer the oath.[37] The person who would be making the interception would not need to be the person under oath. Francis Fox, the former Solicitor General, has described the procedure as follows:[38]

> "Every application for interception provided for under this law is sworn, on oath, before me personally by the Director General RCMP Security Services. I am aware of every case for which such an interception is requested and on my personal authority, as Solicitor General of Canada, permission or its denial is determined."

It would seem to be acceptable (although this is not at all clear) to perform the interception without being physically in possession of the warrant. A further question would be whether the Solicitor General's deputy could act for him in his absence. Even if a more rigid procedure is, in fact, contemplated by the Official Secrets Act there is no reason why the Security Service cannot seek a judicial warrant under the 36 hour emergency provisions in the Code[39] as it is likely that a specific offence such as sedition or sabotage would be the cause of the emergency.[40]

E. *Seizure of Communications*

Although the Criminal Code is only directed at the *interception* of communications, the Official Secrets Act refers to the interception *or seizure* of any communication.[41] This would therefore be wider than simply interception.

The word "communication" is not defined; however, there is no reason to limit it to auditory or visual communications. It could encompass written documents as well. It would not seem to be wide enough, however, to include non-documentary "physical intelligence", also seized by the R.C.M.P. in such entries.[42] In the 1977 Official Secrets Act Report there is included under methods of interception: "One warrant authorizing the interception of written communications outside the course of Post." It may be that the draftsman thought that section 16 was wide enough to cover mail openings. The Mackenzie Commission had recommended that mail opening be permitted because the present rules "provide an open invitation to hostile agents to make use of the mails for their secure communication." "We believe", stated the Commission,[43] "that arrangements should be made (possibly in the course of amendment of the Official Secrets Act) to permit the examination of the mail of persons suspected by the security authorities on reasonable grounds to be engaged in activities dangerous to the security of the state. However, any such examination should also be strictly controlled, and should require ministerial authorization in each instance." The legislation has not, however, been interpreted by the Government to overcome the words "notwithstanding any other Act" in the Post Office Act.[44]

The concept of seizure raises the question of what the Security Service should do with the documents or physical evidence seized. Can it be kept permanently or must it be returned at a later time? The latter would provide the notice of entry which in many cases is thought to be undesirable. Perhaps the legislation should make clear that seizure can only be temporary for the purpose of observation or duplication.

F. *Gathering Foreign Intelligence Information*

Note that the Solicitor General can issue a warrant if it is necessary "for the purpose of gathering foreign intelligence information essential to the security of Canada."[45] "Foreign intelligence information" is not defined and is obviously potentially very wide. There is no limit on who may be the target of the interception. It includes Canadian citizens as well as foreigners. Many, if not most, domestic dissidents would have some connection, however tenuous, with an international movement or with persons outside Canada — even if there was no connection with foreign officials or agents.

The Official Secrets Act provision makes it clear that Canada has the power to engage in espionage and not simply counter-espionage activities. It is claimed, however, that the power is not exercised.[46] As originally drafted[47] the section was less explicit, stating simply that a warrant could be issued if "such interception or seizure is necessary in the public interest." The Annual Reports limit the discussion of "foreign intelligence" to the sphere of the detection and prevention of subversive activity.

G. *The Prevention or Detection of Subversion*

Not only may the Solicitor General issue a warrant for the purpose of gathering foreign intelligence information, but he may do so "for the preven-

tion or detection of subversive activity directed against Canada or detrimental to the security of Canada." "Subversive activity" is elaborately defined in the section.[48]

As originally introduced[49] the section did not define subversion, but permitted a warrant if "the purpose of such interception or seizure is related to the prevention or detection of espionage, sabotage or any other subversive activity directed against Canada or detrimental to the security of Canada." The section, as drafted, was criticized in the Justice and Legal Affairs Committee as too vague.[50] Andrew Brewin voiced the Committee's concern when he stated[51] that "the words 'any other subversive activity' are so broad that they might in the minds of different people cover a wide variety of political activities, or political opposition to governments of the day." As a result, the present provision was proposed as an amendment by Mark MacGuigan and was accepted by the Committee in an 11-1 vote.[52]

The various parts of the definition (which it will be noted uses the word "means" and not "includes" and is therefore exhaustive) will now be looked at.

(i) *espionage or sabotage.* Preventing or detecting "espionage" is understandably included in the definition. But "espionage" is not defined any place. It is clearly much broader than the espionage section in the Code,[53] and would include espionage activity under section 3 of the Official Secrets Act. But would it also include "leakage" under section 4? If so, then the subsection is extremely wide. The provision would seem to be wider than espionage by foreign governments because that type of activity is specifically covered in a later subsection.

"Sabotage" is also understandably included in the section, but again it is not clear what meaning would be given to it. Is it limited to sabotage under section 52 of the Code? We have just seen that espionage would clearly not be limited to the espionage section in the Code. Could sabotage, for example, include mischief under section 387 of the Code, which includes damaging property or interfering with its use?[54] As mentioned in an earlier section the word "sabotage" was derived from this type of activity.[55] But even if section 52 alone is used, this section covers a wide range of conduct in that it is sabotage to cause "property, by whomsoever it may be owned, to be lost, damaged or destroyed" ... "for a purpose prejudicial to ... the safety, security or defence of Canada." It is clearly not necessary that the sabotage activity be carried out with the assistance or encouragement of any foreign power.

(ii) *foreign intelligence activities directed toward gathering intelligence information relating to Canada.* This is also a potentially very wide section, because, as we have seen,[56] the Security Service does not limit the word "information" to information which is either "secret" or even "official". All information which may be useful to a foreign government, even if already in the public domain, would, in the eyes of the Security Service, come within the subsection. Whatever may be the scope of the power to prosecute for this conduct, it appears reasonable to permit surveillance in connection with all foreign

intelligence activities. It is this subsection which could be used for surveillance of foreign embassies.

(iii) *activities directed toward accomplishing governmental change within Canada or elsewhere by force or violence or any criminal means.* This provision was the most controversial one in the Justice and Legal Affairs Commitee because it is clearly directed at domestic subversive activity. An amendment to have it deleted was defeated.[57] But, as we have seen, the espionage and sabotage subsection may also be used in purely domestic cases.

The subsection uses the words "governmental change". Does this include changing a governmental policy or must it be changing the *system* of government or the government itself? The French version of the section uses the language "changement de gouvernment" which more clearly indicates that a change in government is contemplated. Moreover, the language is taken from the sedition section of the Code[58] (with the addition in section 16 of the words "violence or any criminal means") and that section surely contemplates more than a change in government policy. The Minister of Justice, Otto Lang, was certainly of this view: on one occasion before the Justice and Legal Affairs Committee he stated[59] "subversive activity here would be activity that was meant to overthrow a system"; and in a later appearance he stated:[60] "I should give an assurance that the words 'governmental change' are designed to refer to a drastic change in the form of government and not the kind of change of a particular governing party ...." So, for example, the F.L.Q. kidnappings would come within the subsection because they were designed to accomplish, *inter alia*, the type of governmental change contemplated by the provision. But would a kidnapping for the immediate purpose of releasing prisoners involved in such activities come within it? In any event, such conduct would come within the ordinary criminal law wiretapping provisions.

Note that the subsection says that the governmental change (which is not restricted to the Federal government) can be by "any criminal means." Would a unilateral declaration of independence by a province come within this subsection? The problem is a difficult one because the intent is not to use "force or violence or any criminal means." A declaration of independence may be illegal, but until it is opposed by the Federal Government and this opposition is in turn resisted, it is probably not treason.[61] It would, however, probably be considered treasonous if resistance was known to be, or perhaps contemplated as a possibility, even though not desired. If it is thought to be desirable to cover such activity under section 16, whether or not the possibility of resistance is intended, the word "illegal" should be substituted for the word "criminal".

A further problem under this subsection is the meaning of the words "or elsewhere". Can a Solicitor General's warrant be issued for, say, a conspiracy in Canada designed to effect a governmental change in a foreign country? In order to answer this question one must go back to the opening words in subsection (2) and find that the surveillance "is necessary for the prevention or detection of subversive activity directed against Canada or detrimental to the security of Canada." The activity is not directed against Canada but whether it

is "detrimental to the security of Canada" requires a judgment based on the facts of the specific case. A plan organized in Canada to overthrow the U.S. Government would surely be detrimental to the security of Canada, but a plan which had been designed to topple the former Uganda regime may not.

(iv) *activities by a foreign power directed toward actual or potential attack or other hostile acts against Canada.* The power to tap should obviously be given in such a case. This conduct would also be covered under section (2): "gathering foreign intelligence information essential to the security of Canada."

(v) *activities of a foreign terrorist group directed toward the commission of terrorist acts in or against Canada.* This subsection is limited to foreign terrorist groups. So, for example, had the P.L.O. engaged in the type of terrorist activities at the Montreal Olympics that they did in Munich, this would have come within the subsection; but similar conduct by a domestic group would not. In the latter case, however, the police can easily obtain a judicial warrant under the Criminal Code for the specific offence that has been engaged in, including conspiracy to commit that offence in the future.

H. *Surreptitious Entry to Plant Bugs*

One question which was not raised in Parliament or, it would seem, so far in the Canadian literature, is the very obvious question of whether the police who have a warrant to tap can surreptitiously enter a place in order to engage in electronic surveillance.[62]

The question should have been dealt with because the Ouimet Committee had pointed out[63] that "frequently electronic eavesdropping involves a trespassory invasion." And the 1967 U.S. Supreme Court case of *Berger* v. *New York*,[64] which was brought to the attention of the Justice and Legal Affairs Committee,[65] had involved just such conduct. Nevertheless, the legislative debates in Canada are inconclusive on the point. There are hints both ways. For example, the following interchange took place between Toronto Police Chief James Mackey and Hilliard Chappell which indicates that surreptitious entries would not be used:[66]

> *Mr. Chappell*: I take it you would prefer all types of surveillance, that is, wiretap, microphones, camera, long-range listening devices — the whole works; in other words, that everything that criminal element has you have?
>
> *Chief Mackey*: That is right.
>
> *Mr. Chappell*: What about trespass? I take it that you can now hide microphones in certain public and quasi-private places, but I take it you are not seeking any authority, if it could be given, provincially or federally, to go into offices and places such as that to hide microphones?
>
> *Chief Mackey*: You mean to break and enter — this type of thing?
>
> *Mr. Chappell*: Or even to open a door that was not locked.
>
> *Chief Mackey*: I think probably we would do it in a different manner, sir.
>
> *Mr. Chappell*: All right; I will not question you any further on that.

On the other hand, the following testimony[67] by Professor G. Robert Blakey of Notre Dame is some indication that surreptitious entry was contemplated:

> Widespread publicity has been given to the fantastic devices created through micro-miniaturisation. Less widespread publicity has been given to the inherent investigative limitations on the practical use of these devices. It is often difficult, if not impossible, safely to install them where a surreptitious entry is required. Pairs must be located to wiretap. Often one or more additional entries are required to adjust the equipment.

John Scollin of the Department of Justice subsequently gave an opinion in 1974 that a surreptitious entry was permitted in these cases[68] and Prime Minister Trudeau had taken the position that in his view an entry is permissible if there is a warrant to tap or place a bug.[69]

The U.S. wiretapping legislation also says nothing about the issue[70] and the legislative debates, as in Canada, are inconclusive. Perhaps for political reasons in both countries the politicians who thought about the issue did not want to face up to this awkward question.

The issue was recently dealt with by the U.S. Supreme Court in *Dalia* v. *United States*.[71] Prior to this decision the U.S. cases had gone in a number of different directions.[72] In *United States* v. *Agrusa*,[73] for example, the judicial wiretapping order specifically permitted such an entry and a later court held that the entry was legal. In *United States* v. *London*[74] nothing was said in the order about surreptitious entry, and yet an entry was again considered to be legal.[75] In contrast, however, in *United States* v. *Ford*[76] the order provided for "entry and re-entry ... in any manner"; yet the District of Columbia Circuit Court held that the entry was improper because the order was "far too sweeping."[77] In *Dalia* 7 out of the 9 members of the Supreme Court held that it was constitutionally permissible for Congress to authorize covert entries to plant a bug.[78] A majority of the court held that Congress had implicitly authorized such entries: "Those considering the surveillance legislation understood that, by authorizing electronic interception of oral communications in addition to wire communications, they were necessarily authorizing surreptitious entries."[79] The dissenting opinion stated[80] that "it is most unrealistic to assume that Congress granted such broad and controversial authority to the Executive without making its intention to do so unmistakably plain." The majority also held that it was unnecessary, though preferable, for the judicial authorization specifically to include such an entry.

In Canada there would no doubt also be a variety of judicial opinions on this difficult question.[81] If the question reached the Supreme Court of Canada on our present legislation, it is likely that the majority of the present Court would permit surreptitious entry in these cases, but probably only if the judicial order specifically mentioned the entry.

It is true that wiretapping need not involve a trespass, but planting a bug in most cases does. It would be reasonable then for a court to conclude that Parliament must have known that surreptitious entry would sometimes be required. Thus, the problem can be dealt with as a matter of statutory interpretation[82] and so it is not necessary to rely on section 26 of the Interpretation Act which provides:[83]

> "Where power is given to a person, officer or functionary, to do or enforce the doing of any act or thing, all such powers shall be deemed to be also given as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing."

It is not clear whether this section should, in fact, be used in this case. After all, to pick a ridiculous example, a police officer would not have the power to shoot someone to enable the officer "to do or enforce the doing of the act or thing."

On the question of whether the judicial order must refer to the entry, a distinction can be made between wiretaps before 1977 and wiretaps today. Prior to the 1977 amendments[84] the officer's affidavit[85] and the judicial order[86] did not have to refer to the place at which the communication was to be intercepted or the manner of interception, unless the identity of the person who was the object of the surveillance was unknown. Thus it is arguable that the absence of an order mentioning the method of entry did not mean that it could not be done. In 1977, however, these sections were changed[87] to specify that both the officer's affidavit and the judge's order should include a general description of the place and "generally describe the manner of interception that may be used." Surely today, if the order does not describe that a surreptitious entry will be undertaken, no such entry should be made. If an entry can be made under the Code when it is stated in the judicial order, then such an entry can clearly be made when it is stated in an order under the Official Secrets Act. Indeed, the case under section 16 is stronger than under the Code because it refers to "seizure" and this necessarily involves entry. Moreover, for security reasons, it is likely that the Security Service would be less inclined to involve telephone company personnel than those in ordinary police work. The July 25, 1978 Public Statement by the R.C.M.P. Security Service on Surreptitious Entry[88] showed that since 1971, 55 out of 223 of the long-term technical devices involved entry. The ratio in ordinary police work is probably far lower. Again it is arguable that surreptitious entry would be permissible even without being specifically mentioned in the warrant. Section 16(4) does not require that the warrant mention the method of entry.[89]

The best solution to this problem for future cases would be to spell out in the legislation whether surreptitious entry is or is not permitted.

I. *Conclusion*

The scope of section 16 should be reconsidered. The subsections relating to domestic security should be brought into the Criminal Code wiretapping provisions, or at least more in line with those provisions. Wiretapping in such cases should be linked to specific criminal conduct. Espionage and counter-espionage, however, should not necessarily be so linked. Espionage by a foreign government may not necessarily constitute a criminal offence, but should be the subject of concern and possible surveillance. Should a judicial warrant be required in these cases? In a later part of this study the conclusion is reached that with the possible exception of the surveillance of foreign embassies and foreign agents judicial warrants issued by specially created

courts should be required. This is in line with recent U.S. legislation, described in the next section.

III. U.S. Law: Search and Seizure in Cases of National Security

A brief foray into U.S. law will show the complexity of the subject in that jurisdiction. An outsider has considerable difficulty in understanding their law on this issue. It consists of a mixture of legislation, Executive Orders, policy guidelines, case-law and constitutional doctrine. Moreover, their law has and is changing at a very rapid rate — too fast for this writer to purport to have a complete and accurate picture of it.

The 1976 Church Report[1] outlined in great detail the abuses that had taken place in the past, as had earlier reports.[2] It showed large numbers of warrantless searches, including such searches in cases of domestic subversion. Surreptitious entries without warrant to search for evidence are known in the U.S. as "black-bag jobs". Professor James Q. Wilson has written:[3]

> Black-bag jobs have been used by the FBI for at least thirty five years. By its own admission, the Bureau made at least 238 surreptitious entries of homes and offices of persons judged to be domestic-security risks between 1942 and 1968 ....

In 1972 the U.S. Supreme Court in the *Keith* decision[4] had unanimously decided that warrantless searches, even if authorized by the President, were not constitutionally permissible in cases involving *domestic* threats to security. The Supreme Court noted that "the use of such surveillance in internal security cases has been sanctioned more or less continuously by various Presidents and Attorneys General since July 1946."[5] The Supreme Court did not accept the distinction argued by the government between gathering intelligence and gathering evidence for prosecution purposes. The *Keith* case, it should be pointed out, did suggest that Congress could draw a distinction between surveillances for "ordinary crime" and that involving domestic security, stating:[6] "Congress may wish to consider protective standards for [domestic security] which differ from those already prescribed for specified crimes in [the existing wiretapping legislation]. Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens."

Further entries without a warrant did, however, occur after the *Keith* prohibition. The prosecutions presently taking place in the United States against L. Patrick Gray, formerly the Director of the F.B.I., and other senior F.B.I. persons because of surreptitious entries that occurred after the *Keith* decision (to search for Weathermen fugitives) may test the constitutional limits of the *Keith* decision in cases with a foreign aspect.[7] In *Keith* there was "no evidence of any involvement, directly or indirectly, of a foreign power,"[8] and

the Court stated:[9] "We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents." Title III of the 1968 Omnibus Crime Control and Safe Streets Act[10] did not deal with this area except to say that the Act would not "limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities."[11] The area is a very complex one in the United States and is still far from clear.[12]

The National Commission on Reform of Federal Criminal Laws did not deal with procedure and thus did not face this issue; its Code simply penalized illegal wiretapping without saying when it would be illegal.[13] In view of uncertainty surrounding the subject, the Report of the Watergate Special Prosecution Force recommended[14] that "The Administration should promulgate publicly its current policy, stating the precise power claimed by the President and setting forth in as great detail as possible the factors and standards that now govern the President's and Attorney General's exercise of discretion in authorizing warrantless foreign intelligence searches and seizures." In the Presidential Executive Order of January 1978 the executive power to authorize intelligence taps was substantially limited. Section 2-201(b) provides that activities "for which a warrant would be required if undertaken for law enforcement rather than intelligence purposes shall not be undertaken against a United States person without a judicial warrant, unless the President has authorized the type of activity involved and the Attorney General has both approved the particular activity and determined that there is probable cause to believe that the United States person is an agent of a foreign power." It will be noted that these procedures apply to "a United States person", i.e., an American citizen or landed immigrant, whether within or outside the United States. Nothing is said in the Order, however, about using these techniques against foreigners. In the case of Americans, the probe, whether physical or electronic, can only be done if the President approves the type of activity and the Attorney-General consents to the activity in the specific case as well as determining in that case that there is "probable cause to believe that the United States person is an agent of a foreign power", a much higher burden than simply receiving encouragement and some financial support from a foreign power.

As a result of the findings and recommendations of the Church Report[15] a lengthy Bill was introduced into the United States Senate on February 10, 1978 by Senator Walter Huddleston. The Huddleston Bill,[16] the "National Intelligence Reorganization and Reform" Bill, attempts to provide a comprehensive statutory framework for all the entities in the so-called "intelligence" community. It does not purport to deal with domestic subversion issues which are mainly the concern of the F.B.I. Comparable "charter legislation" to govern the F.B.I. has been under consideration by the Senate Judiciary Committee. The White House has almost completed draft legislation which will soon be forwarded to Congress.[17]

By mid-1979, only a small part of the Huddleston Bill, that dealing with electronic surveillance for foreign intelligence purposes, had been enacted (in a modified version). This legislation,[18] known as the "Foreign Intelligence Surveillance Act of 1978", was enacted on October 25, 1978. It permits a very limited amount of electronic surveillance without a warrant. The Act provides[19] that the President, through the Attorney General, can authorize electronic surveillance without a court order to acquire foreign intelligence information for periods of up to one year if the Attorney General certifies in writing under oath, *inter alia*, that the communication is between or among foreign powers and that there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party. In other cases foreign intelligence information is obtained in the United States by virtue of a court order issued by one of seven district court judges publicly designated by the Chief Justice of the United States from seven of the U.S. judicial circuits.[20] Each application, which requires the approval of the Attorney General, must contain certification by a very senior executive officer that, *inter alia*, the purpose of the surveillance is to obtain foreign intelligence information which cannot reasonably be obtained by normal investigative techniques.[21]

IV. Opening Mail

Mail opening was touched on in an earlier section on the Royal Prerogative where the long history of opening mail in England was discussed. The earliest recorded instance was in 1324 when Edward II, noting the entry into the kingdom of "many letters prejudicial to the Crown," issued a writ commanding the interception of "all letters concerning which sinister suspicions might arise."[1] The power was specifically recognized in the Postal Acts in England from the 18th century on.[2] Indeed, when Cromwell set up the first regular Post Office in 1657 it was stated in the Ordinance to be the "best Means to discover and prevent any dangerous and wicked Designs against the Commonwealth."[3] The power was used extensively in the first half of the 18th century to frustrate Jacobite plots.[4] (Walpole even set up a decyphering department to break the codes which were often used.[5]) The 1837 English Postal Act, for example, stated:[6]

> XXV. And be it enacted, That every Person employed by or under the Post Office who shall contrary to his Duty open or procure or suffer to be opened a Post Letter ... shall in England and Ireland be guilty of a Misdemeanor, and in Scotland of a Crime and Offence ... Provided always, that nothing herein contained shall extend to the opening ... of a Post Letter ... in obedience to an express Warrant in Writing under the Hand (in Great Britain) of one of the Principal Secretaries of State, and in Ireland under the Hand and Seal of the Lord Lieutenant of Ireland.

A controversy was created in Parliament in 1844 when it was discovered that the Secretary of State for Foreign Affairs had issued a warrant permitting the opening of letters of Joseph Mazzini, an Italian revolutionary who was thought to be planning a rebellion in Italy.[7] Secret Committees of the Com-

mons[8] and the Lords[9] were set up, but both confirmed the existence and the desirability of the power. Between 1822 and 1844 one hundred and eighty-two such warrants had been issued, approximately eight per year.[10]

The same activity no doubt occurred in Canada. In the first half of the 19th century all postal service in Canada was controlled by Britain. It was not until an 1849 English Act permitted colonial legislatures to establish inland posts[11] that the Province of Canada could and did establish a postal service.[12] Canada did not establish a postal service for overseas mail until 1867.[13]

There can be little doubt, therefore, that mail would have been opened in Canada in the first half of the 19th century. The 1844 English Commons Committee had specifically stated in their Report[14] that mail could be opened with a warrant "for the purpose of discovering the designs of persons known or suspected to be engaged in proceedings ... deeply involving British interests, and carried on in the United Kingdom or in British Possessions beyond the seas." We know that in the rebellion of 1837 mail was opened. William Smith's History of the Post Office in British North America[15] related that in that year "it was decided to have the correspondence of suspects placed under surveillance .... Letters supposed to contain information of the rebels were sent to the bank of Upper Canada, where they were subjected to scrutiny." And no doubt other cases could be discovered.

When the Canadian Inland Post Act was passed in 1850 it contained a provision relating to opening mail but instead of specifically mentioning the power of the Secretary of State it stated that it was an offence "to open *unlawfully* ... any Post Letter ...."[16]

The word "unlawfully" has been in the Canadian legislation since then. Section 58 of the present Post Office Act[17] states:

> 58. Every person is guilty of an indictable offence who unlawfully opens or wilfully keeps, secretes, delays or detains, or procures, or suffers to be unlawfully opened, kept, secreted, or detained, any mail bag, post letters, or other article of mail, or any receptacle authorized by the Postmaster General for the deposit of mail, whether the same came into the possession of the offender by finding or otherwise.

In the early years after Confederation it may have been possible to argue that the power to open mail under a warrant still existed.[18] But the power was not exercised and though possibly it was forgotten, more probably it was specifically abandoned. In 1950 the Postmaster General stated in the House:[19] "No one in the Post Office Department, not even the Postmaster General, with the exception of those in the dead letter organization, has any right to open a letter, so there is no way of knowing what is inside it ...."[20] So, as pointed out earlier, if the power did exist, it appears to be a case of the "vanishing prerogative."

The Official Secrets Act provisions have already been examined. Section 11, the search section, could not apply to mail because of section 43 of the Post Office Act which provides:

> 43. Notwithstanding anything in any other Act or law, nothing is liable to demand, seizure or detention while in the course of post, except as provided in this Act or the regulations.

No regulations have been passed under the Post Office Act authorizing the use of section 11, although they could have been. Section 7 of the Official Secrets Act deals only with telegrams. In England, it will be recalled, the corresponding section extends to private postal systems, a power needed to supplement the existing power to open mail within the State-run system. Finally, section 16, as we have seen, allows the seizure of communications, but again would not be able to counteract the "Notwithstanding" words in section 43 of the Post Office Act.[21] For the same reason the search warrant section of the Criminal Code (s. 443) also could not be used to authorize opening mail.

Thus the power to open mail for security purposes is not permitted at the present time. Nevertheless it has been taking place for a number of decades. In June, 1978 the Commissioner of the R.C.M.P., R.H. Simmonds, described to the Commons Justice and Legal Affairs Committee the practice (known as operation CATHEDRAL) of the Security Service in opening mail as follows:[22]

> I think at this point it is worthwhile to consider precisely what the record of the Security Service is since 1970 with respect to the opening of mail. I believe that the figures presented an average of less than 10 openings a year for the last seven years, many of those a response to the October 1970 crisis. This will readily indicate to you, I believe, that the Security Service has been extremely circumspect in its use of CATHEDRAL. I think these statistics further show that public representations of a 'massive' mail opening campaign by the Security Service are in essence the produce of wild imagination.
>
> In the period 1970-78 there have been six CATHEDRAL "A" operations, which were limited to the Security Service taking note of names and addresses. There were twenty CATHEDRAL "B" operations, which was an expansion of "A" to include photographing or photocopying of the outside of the mail cover only. And there were sixty-eight CATHEDRAL "C" operations, which authorized mail interceptions and attempted examination of the contents.

The Government introduced legislation in early 1978 to permit mail openings.[23] The legislation was discussed in Committee, but was not reported back to the House and died on the Order Paper at the end of the Session. The proposed legislation, which was to expire one year after the McDonald Commission report was tabled in Parliament,[24] would have allowed the opening of mail to search for narcotics and also to prevent or detect subversion. The former adopts the same procedures as are now used for wiretapping authorizations, and the latter the same as are now used for intercepting and seizing communications under section 16 of the Official Secrets Act. The proposed legislation would have amended section 43 of the Post Office Act so that it would now read "Notwithstanding anything in any other Act or law, nothing is liable to demand, seizure or detention while in the course of post except under the authority of a warrant issued pursuant to section 16 of the Official Secrets Act."[25] The legislation was not mentioned in the Speech from the Throne in the Fall of 1978 and at the time of writing has not been reintroduced.

In the United States the Church Committee had disclosed widespread improper surveillance of the mails.[26] The White House Executive Order of January 1978 has attempted to control these operations by providing:[27]

> "No agency within the Intelligence Community shall open mail or examine envelopes in United States postal channels, except in accordance with applicable statutes and regulations. No agency within the Intelligence Community shall open mail of a U.S. person abroad except as permitted by procedures established pursuant to [an earlier section]."

The Security Service should have the power to open mail entering or leaving the country, whether or not the power is frequently exercised. Not to have it is an open invitation to use the mails for espionage.[28] It is not surprising that the Russians attempted to find out about mail openings from the postal clerk, Spencer.[29]

The use of the power in relation to domestic subversion is another matter — as are controls on its use. As we have seen, the concept of subversion is too indefinite to be left solely in the hands of the government. Some form of judicial control is necessary. Assuming that adequate judicial controls are built in, then, on balance, power to open mail in domestic cases should be permitted. It is difficult to distinguish this form of interference with communications from electronic surveillance.

V. Informants and Entrapment

The previous sections have concentrated on technical sources; in this section we look at what the police call "human sources."[1] "Any Security Service," wrote the Mackenzie Commission,[2] "is to a large extent dependent upon its network of agents, on the scale of their penetration of or access to useful targets and on their reliability." The Commission went so far as to say[3] that "it is impossible fully to comprehend or contain the current threats to security — especially in the field of espionage — without active operations devoted to the acquisition of human sources."

The Canadian Security Service has engaged in such conduct for decades. In the Tim Buck prosecution in 1932[4] (mentioned in an earlier section) the evidence showed that the police had been able to place an undercover officer on the executive of the Communist Party and for ten years he participated in the Party's inner councils — even going to a conference in Moscow in 1924.[5] No doubt a police agent was at the secret meeting held in a barn at Guelph, Ontario in 1921 when the Communist movement in Canada is said to have begun[6] — certainly a more acceptable procedure than burning it down!

There is a range of conduct that can be undertaken by "human sources," ranging from a member of a "subversive" organization volunteering information to the police, to the officer who acts as an *agent provocateur* by promoting or planning illegal activities. The line between the two is never a clear

one, however, because as one sociologist has written,[7] "there are pressures inherent in the role that push the informant toward provocation."

The judiciary has not had any difficulty in accepting the informant and the infiltrator. The courts have always been careful to protect their identity from disclosure.[8] Even Chief Justice Laskin wrote in 1977 in the *Kirzner* case,[9] which involved narcotics: "The use of spies and informers is an inevitable requirement for detection of consensual crimes and of discouraging their commission .... Such practices do not involve such dirty tricks as to be offensive to the integrity of the judicial process." Similarly, the Lord Chief Justice of England stated in a 1974 case:[10] "So far as the propriety of using methods of this kind is concerned, we think it right to say that in these days of terrorism the police must be entitled to use the effective weapon of infiltration." But the infiltration cannot go too far. Chief Justice Widgery went on to say[11] that the officer "must endeavour to tread the somewhat difficult line between showing the necessary enthusiasm to keep his cover and actually becoming an agent provocateur, meaning thereby someone who actually causes offences to be committed which otherwise would not be committed at all." Chief Justice Laskin expressed the same concern when he stated:[12] "The problem which has caused judicial concern is the one which arises from the police-instigated crime, where the police have gone beyond mere solicitation or mere decoy work and have actively organized a scheme of ensnarement, of entrapment, in order to prosecute the person so caught."

How does one prevent this type of excessive activity? The literature is replete with suggestions.[13] In England the Home Office has issued an administrative circular on the subject, breach of which may lead to disciplinary action or prosecution.[14] The Circular states, in part, that "the informant should always be instructed that he must on no account act as agent provocateur, whether by suggesting to others that they should commit offences or encouraging them to do so, and that if he is found to have done so he will himself be liable to prosecution." No similar guidelines appear to be in existence in Canada. Techniques of recruitment of informants is another area in which criminal offences, for example, assault, false imprisonment or extortion, would obviously be improper.

Should the method of entrapment provide a defence for a person who commits an offence? The English courts have said no,[15] and thus far so have the Canadian courts, although entrapment will be relevant in sentencing. In the *Lemieux* case in the Supreme Court of Canada, Judson J. stated[16], although it was not necessary to the decision: "Had Lemieux in fact committed the offence with which he was charged, the circumstance that he had done the forbidden act at the solicitation of an *agent provocateur* would have been irrelevant to the question of his guilt or innocence." The question came up again before the Supreme Court of Canada in *Kirzner*.[17] The Ontario Court of Appeal held that no defence of entrapment was available.[18] Five members of the Supreme Court of Canada held that it was unnecessary for them to discuss the point. Chief Justice Laskin, with whom three other members of the Court concurred,[19] stated that the evidence in this case could not amount to

entrapment, and preferred "to leave open the question whether entrapment, if established, should operate as a defence."[20] It is clear, however, that Chief Justice Laskin is rightly sympathetic to the establishment of a defence in a limited number of cases, possibly by way of a stay of proceedings.[21] The Ouimet Committee[22] accepted the necessity of using informers and undercover agents, but recommended "a clear legislative statement with respect to the unacceptability of official instigation of crime."[23] The Committee recommended the enactment of legislation to provide:

> "1. That a person is not guilty of an offence if his conduct is instigated by a law enforcement officer or agent of a law enforcement officer, for the purpose of obtaining evidence for the prosecution of such person, if such person did not have a pre-existing intention to commit the offence.
>
> 2. Conduct amounting to an offence shall be deemed not to have been instigated where the defendant had a pre-existing intention to commit the offence when the opportunity arose and the conduct which is alleged to have induced the defendant to commit the offence did not go beyond affording him an opportunity to commit it.
>
> 3. The defence that the offence has been instigated by a law enforcement officer or his agent should not apply to the commission of those offences which involve the infliction of bodily harm or which endanger life."

A recent English Law Commission Report[24] did not recommend that an entrapment defence be introduced into English law; rather, it concluded that Parliament should create a new criminal offence to deal with the *agent provocateur*. "The main advantage of such an offence," the Report states,[25] "would be that it would provide a sanction against reprehensible conducts by agents without exonerating the entrapped party." This is an attractive solution to the problem, but it should not preclude the introduction of an entrapment defence.

Even if the English Law Commission solution were adopted, there would still be a number of specific situations where the entrapment would result in a defence for the accused; for example, in the case of possession of stolen goods, the goods might no longer be considered stolen goods;[26] in the case of breaking and entering, the house might not have been broken into without the consent of the owner;[27] and in the case of treason, the enemy may not actually have been assisted.[28] However, in Canada it may be possible in these cases to convict the accused of an attempt.[29]

American law does recognize an entrapment defence.[30] The main issue debated in the American cases and literature is not whether there should be a defence but rather whether it should apply whenever the police conduct is such as to cause a reasonable person to engage in the conduct (the so-called "objective" test) or whether the defence applies only to persons who were not otherwise predisposed to commit the offence (the so-called "subjective" test). The U.S. Supreme Court has favoured the subjective test;[31] the Commissions that have studied the issue have favoured the objective test.[32]

The law also discourages some forms of entrapment by not providing a defence to the police officer who takes part in the activity. Chief Justice Laskin stated in *Kirzner*[33] that "The police, or the *agent provocateur* or the

informer or the decoy used by the police do not have immunity if their conduct in the encouragement of a commission of a crime by another is itself criminal. Of course, whether they are prosecuted is a matter for the Crown Attorneys and, ultimately, for the Attorneys-General."

This area of the law is not at all clear.[34] It is not likely that the courts would convict a police informer who played a minor role towards the execution of a crime in order to frustrate the crime. At the other extreme, they would convict an informer who played a major part in a serious crime, whatever his purpose.[35] But few such cases will ever reach the courts and so the law will necessarily remain uncertain.[36] This, of course, makes it difficult for infiltrators to know how far they can go in proving their bona fides to a terrorist group.

Because of the growing concern about the use of infiltrators and informers in the United States in relation to national security,[37] there has been a cutback in their use. The F.B.I. apparently has now under 50 domestic security informers providing information about alleged subversive or terrorist groups, a significant drop from 1976 when the bureau acknowledged almost 600 domestic security informers.[38] The Presidential Executive Order of January 1978[39] attempts to control the extent of their operation by providing:

> 2-207. *Undisclosed Participation in Domestic Organizations.* No employees may join, or otherwise participate in, any organization within the United States on behalf of any agency within the Intelligence Community without disclosing their intelligence affiliation to appropriate officials of the organization, except as permitted by procedures established pursuant to [an earlier section]. Such procedures shall provide for disclosure of such affiliation in all cases unless the agency head or a designee approved by the Attorney General finds that non-disclosure is essential to achieving lawful purposes, and that finding is subject to review by the Attorney General. Those procedures shall further limit undisclosed participation to cases where:
>
> (a) The participation is undertaken on behalf of the FBI in the course of a lawful investigation;
>
> (b) The organization concerned is composed primarily of individuals who are not United States persons and is reasonably believed to be acting on behalf of a foreign power; or
>
> (c) The participation is strictly limited in its nature, scope and duration to that necessary for other lawful purposes relating to foreign intelligence and is a type of participation approved by the Attorney General and set forth in a public document. No such participation may be undertaken for the purpose of influencing the activity of the organization or its members.

The draft F.B.I. Charter, which will soon be sent to Congress,[40] states:

> Each informant shall be advised that in carrying out his assignments he shall not participate in crimes of violence, use unlawful techniques to obtain information for the F.B.I., or initiate a plan to commit criminal acts.

The same section, however, sets out guides for Bureau or Justice Department officials in deciding whether criminal conduct is justified:

> In making the determination that the conduct is justified, the official shall determine that the conduct is necessary to obtain information or evidence for

> prosecutive purposes or to prevent or avoid death or serious bodily injury, and that this need outweighs the seriousness of the conduct involved. The Director or his designee shall be advised whenever an informant or undercover agent participates in a crime of violence while carrying out his assignment for the F.B.I.

Undercover agents may participate in illegal activity for the same reasons, as well as to "establish and maintain credibility or cover with persons associated with the criminal activity under investigation."

Similar controls, including specific procedures as outlined in the Home Office circular, should be considered for Canadian police. Informers and infiltrators may well be necessary in all police work, including national security, but there should be more controls than now exist. After all, the infiltrator is often intruding on private communications just as much as the wiretapper. Moreover, the infiltration obviously requires deception and lying. Indeed, in some cases it may require lying to other government agencies in order to obtain documentation, such as licences, visas and passports, to support the infiltrator's cover. In addition to administrative controls, it would be desirable to introduce a statutory entrapment defence along the lines suggested by the Ouimet Committee.

VI. Some Possible Defences

Assuming a surreptitious entry for surveillance is made by police officers without a warrant, what is the likelihood of convictions being obtained if charges are brought?[1] As a preliminary step it will be necessary to examine some of the offences that might be applicable. This discussion will not be a detailed one; the purpose is to examine the range of possible offences to which the so-called defences discussed below may be applicable. Although the purpose of this paper is to examine problems connected with national security, what follows is, of course, also relevant to the ordinary criminal law. Further, the discussion, while focussing on surreptitious entry, can also be applied to other questionable behaviour, such as theft of explosives and barn burnings, which are being investigated by the Commission.

There is little doubt that, subject to a valid defence, the conduct is illegal in that it would be subject to a civil trespass action. As Lord Camden stated in *Entick* v. *Carrington*:[2] "Every invasion of private property, be it ever so minute, is a trespass." In a civil action, mistake of law or fact would not be a valid answer if the entry was intentional.[3] The question to be discussed here, however, is whether criminal proceedings are possible and that requires finding a specific offence that covers the conduct.

In the United States problems connected with surreptitious entry have been tested by charges of conspiracy to violate the constitutional rights of the person whose place was entered. So, for example, John Ehrlichman and others were charged with conspiracy to violate the civil rights of Ellsberg's psychiatrist.[4] But no such offence has so far been developed in Canada and it is not

likely[5] that the courts would now judicially extend criminal law in this manner.[6]

There are a number of Criminal Code provisions that would obviously have to be carefully considered. Breaking and entering under section 306 and being unlawfully in a dwelling house under section 307 both require an "intent to commit an indictable offence therein" and in most cases there would be no such intent.[7] (Removing a document, even temporarily, could amount to the indictable offence of theft under the Code;[8] wiretapping without authorization could amount to the indictable offence of unlawful interception under s. 178.11.) Possession of house-breaking instruments under section 309 requires that the instruments be used or intended to be used for "house-breaking" and the courts may well require a breaking and entering under section 306 and therefore "an intent to commit an indictable offence therein."

Other offences which are possible, but, again, do not sit comfortably with the fact situation being explored here are forcible entry under section 73, breach of trust under section 111, trespassing at night under section 173, and mischief under section 387. But forcible entry requires that it be "in a manner that is likely to cause a breach of the peace or reasonable apprehension of a breach of the peace"; breach of trust likely would require some personal advantage to the officer;[9] trespassing at night requires that the person "loiters or prowls" and although it may be possible to describe the police activity in this way,[10] it is not a particularly apt description of it; and mischief requires that a person "wilfully ... obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property" and this might be inapplicable if nothing was interfered with. Of course, in any specific case the facts might bring these sections into play. For example, a surreptitious entry and search may have resulted in filing cabinets being left in disarray and thus section 387 might well be applicable.

The provincial Petty Trespass Acts, all of which are somewhat different, also provide a criminal penalty. The Ontario Act,[11] for example, makes a person subject to a maximum $100 fine who "unlawfully enters or in any other way trespasses upon another person's land, that is enclosed ...", which presumably covers a person's home, whether owned or leased. There is a defence provided in a later section[12] for a person acting under "a fair and reasonable supposition that he had a right to do the act complained of." Because the offence is a summary conviction offence there is a six month limitation period on prosecutions.[13] But the limitation period would not apply to a conspiracy charge under the Code and so a key question is whether it is an offence to conspire to breach the Petty Trespass Act.

It is not at all clear whether the Supreme Court of Canada would permit a conviction for such a conspiracy. Section 423(2) of the Code states that "Everyone who conspires with any one (a) to effect an unlawful purpose, or (b) to effect a lawful purpose by unlawful means, is guilty of an indictable offence and is liable to imprisonment for two years." Although the Supreme Court of Canada held in *Regina* v. *Feeley, McDermott and Wright*[14] in 1964 that an "unlawful purpose" extends beyond Criminal Code provisions and in

that case encompassed a breach of the Ontario Police Act,[15] it is doubtful whether they would extend it to an offence under a provincial Trespass Act that carries a maximum fine of only $100 and no jail sentence.[16] Even in England where the courts have given common-law conspiracy a very wide meaning, not restricting it to breaches of statutory law,[17] the House of Lords held in 1974 that conspiracy to trespass was not by itself an offence; something more was required as, for example, interference with a public building.[18] The Supreme Court may, however, follow the lead given by the House of Lords and selectively choose those trespasses which should be subject to a conspiracy charge. If the Supreme Court adopted such a course there is little doubt it would uphold a conviction for conspiracy to trespass when R.C.M.P. officers break into a building without a warrant.

This rather brief examination shows the range of offences that may be in issue if charges are brought. Naturally, the accused must not only have the requisite actus reus but also the appropriate mental state or mens rea. This is not a matter of defence but a positive ingredient of the offence. So, for example, as we have seen, the breaking and entering section requires an "intent to commit an indictable offence therein" and the mischief section requires that the act be done "wilfully". We now turn to a number of specific defences.

A. *Necessity*

No defence of necessity could possibly be applicable to the fact situation envisaged here, i.e., surreptitiously entering a place without a warrant to search for evidence. The defence is relevant in criminal cases in two ways: either because of a national emergency or because of necessity in the specific case. The former, if it exists, would be under a prerogative power to declare martial law in time of extreme urgency such as war or an armed uprising. But we have already seen that the prerogative no longer exists to the extent that Parliament has taken hold of the matter, and this is the case in Canada under the War Measures Act,[19] to be discussed in a later section. So, subject to the later discussion on martial law, no general emergency power outside the War Measures Act now exists in Canada, whatever may be the case in England.

Necessity in the specific case is theoretically possible because of the qualified acceptance of the necessity defence in Canada in the *Morgentaler* case.[20] But it would be extremely difficult to apply it here. Dickson, J. stated for the majority of the Supreme Court[21] that "if it does exist it can go no further than to justify non-compliance in urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible." Not only must the situation be one of great urgency but the harm averted must be "out of all proportion to that actually caused by the defendant's conduct."[22]

There are several cases where necessity has been relied on in situations involving national security. In the 1779 case of *Stratton*[23] former members of the Governor's Council of Madras had assaulted and imprisoned the Governor. They argued that their actions were necessary to preserve the settlement of Madras. Lord Mansfield C.J. stated[24] that the question was "whether there

was that necessity for the preservation of the society and the inhabitants of the place as authorises private men ... to take possession of the government." They were acquitted. Acquittals also resulted in what has become known as the *Bisbee Deportation Case* in 1917 in Arizona when over 1,000 strikers (members of the International Workers of the World, or "Wobblies") were transported to New Mexico by a large armed posse. A posseman, in a test case, was acquitted by a jury on the defence of necessity.[25] The defence more frequently arises in connection with the right of the police or firemen to speed or go through red lights. Although Lord Denning in one case accepted counsel's agreement that the law of necessity would never permit a fire engine to go through a red light to save someone in a burning building,[26] an English Divisional Court in a later case[27] held that the police in an emergency situation could order a person to go the wrong way on a one-way street.[28]

Assuming that the defence exists in Canadian law and that it is possible to conceive of theoretical cases where necessity may be a defence to a surreptitious entry by the police, the type of fact situation examined by the Commission cannot possibly justify the defence. There is neither the urgency to act before a warrant could be obtained nor the great harm averted which is necessary for the defence to succeed.

B. *Justification by Result*

It is sometimes suggested that the fact that evidence is admissible justifies the procedures used to obtain it.[29] This is wrong. The fact that Canadian and English courts do not want "the criminal ... to go free because the constable has blundered"[30] should not mean that proceedings cannot be taken against the constable.

The English case of *Elias* v. *Pasmore*[31] suggests that the admissibility of the evidence may affect the validity of the seizure.[32] But the case has been criticized by academic writers[33] and has been narrowly confined by the Courts.[34] As Lord Denning stated in *Ghani* v. *Jones*:[35] "The lawfulness of the conduct of the police must be judged at the time, and not by what happens afterwards." The admissibility of the evidence therefore will have no effect on the validity of the police conduct.[36]

C. *Section 25 of the Criminal Code*

Section 25 of the Criminal Code would not protect the police. The relevant part of the section provides that "Every one who is required or authorized by law to do anything in the administration or enforcement of the law ... as a peace officer ... is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose." The section is likely to be narrowly construed by the Supreme Court of Canada. It was so construed by the four judges who dealt with the point in *Eccles* v. *Bourque*.[37] It will be recalled that the issue in that case was whether the police could forcibly enter and trespass on a third person's property in order to make an arrest. One of the defendant

policemen's arguments was that they were authorized to do so. Five members of the Supreme Court did "not wish to express any view with respect to the application of section 25(1) of the Criminal Code to the circumstances of this case."[38] But Dickson J., speaking for three other members of the Court,[39] stated that section 25 was not applicable:

> The section merely affords justification to a person for doing what he is required or authorized by law to do in the administration or enforcement of the law, if he acts on reasonable and probable grounds, and for using necessary force for that purpose. The question which must be answered in this case, then, is whether the respondents were required or authorized by law to commit a trespass; and not, as their counsel contends, whether they were required or authorized to make an arrest.

Precisely the same reasoning could be applied to the case of surreptitious entry: that is, "whether the police were required or authorized by law to commit a trespass" and the answer is surely "no".

D. *Section 26 of the Interpretation Act*

Section 26(2) of the Federal Interpretation Act[40] states: "Where power is given to a person, officer or functionary, to do or enforce the doing of any act or thing, all such powers shall be deemed to be also given as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing." Just as the Supreme Court is likely to give a narrow construction to section 25(1) of the Code, so is it likely to hold that this section cannot *by itself* justify a trespass to plant a bug even when there is an authorization or warrant to intercept a communication,[41] although as previously discussed, the Court is likely to construe the wiretapping legislation as permitting a trespass if it is so stated in the judicial order. It is almost certain that the Supreme Court would not use the section to authorize a surreptitious entry in cases were no authorization or warrant at all were in existence.

E. *Ignorance or Mistake of Law*

An R.C.M.P. officer has stated with respect to a surreptitious entry:[42] "This was a security operation. It was kosher [because] it was approved from the top down and therefore it was legal as far as I was concerned." How far will such a mistake of law provide a defence?

Canadian law is clear that as a general rule ignorance of the law is no excuse. "Ignorance of the law by a person who commits an offence", states section 19 of the Criminal Code, "is not an excuse for committing that offence." Yet there are a number of exceptions which would have to be considered in deciding whether there is criminal responsibility for illegal conduct in specific cases. In the first place, the language used in specific sections may allow a defence of mistake of law; secondly, there is a growing body of law that reliance on government advice constitutes a defence; and finally, the concept of superior orders has to be examined. A further situation should be mentioned, that is, a defence of ignorance or mistake of *fact* which often looks like a defence of ignorance or mistake of law. Assuming mens rea is required for a

particular offence, mistake of fact would be a defence.[43] So, for example, it would be a defence if an officer mistakenly thought a warrant was in existence, but not if he thought a warrant was not necessary.[44]

Sometimes the words of the section will permit a defence of mistake of law. So, for example, the Ontario Court of Appeal allowed such a defence in one case in view of the words "colour of right" in the theft section,[45] but did not for the word "knowingly" in another case involving a section of the Securities Act.[46] The words "without lawful excuse" used in a number of the potentially applicable offences discussed earlier[47] are also capable of permitting a defence of mistake of law, but whether the courts will construe the sections this way is not at all clear. The Exchequer Court of Canada in a 1969 case[48] held that the phrase did permit a defence of mistake of law; but a number of other cases, including an English Divisional Court judgment, have held that it does not.[49] In the latter case Chief Justice Widgery stated[50] that mistake of fact would be an excuse, but not mistake of law:

> I think that in order for the defendant to have lawful excuse for what he did, he must honestly believe on reasonable grounds that the facts are of a certain order when, if they were of that order, he would have an answer to the charge, and indeed his conduct would be lawful and not contrary to the law. I do not believe at any time one can have lawful excuse for conduct because one is mistaken as to the law; everyone is supposed to know the law, but a mistake of fact of the kind which I have described seems to me to amount to lawful excuse.

It is certainly not clear how the Supreme Court of Canada would deal with these words, but in the light of an earlier Supreme Court case restricting the scope of the mistake of law defence[51] the Court would likely add another authority to Smith and Hogan's statement[52] that "the courts have shown little inclination to give a generous interpretation to authority and excuse as defences to crime."

The courts may develop some limited exceptions to the no-mistake-of-law principle. Some Canadian courts have already done so, for example, in one case when the accused did not know about a regulation which had not been publicized,[53] and in another when there was reasonable reliance on a government agency concerning a regulation, even a published one.[54] The English courts have shown less inclination to develop exceptions to the general rule.[55] In any event, Canadian courts would be reluctant to extend these exceptions very far. So, for example, reliance on a lawyer's advice has not and likely will not excuse conduct, in part because we do not want clients shopping around for a favourable opinion, and also because we do not want to give lawyers "the power to grant indulgences, for a fee, in criminal cases."[56] The American Model Penal Code[57] as well as the Brown Commission Code[58] also reject lawyers advice as a defence. Both these Codes, however, allow a mistake of law if the accused acts, to quote the Model Penal Code, in reasonable reliance on "an official statement of the law, afterward determined to be invalid or erroneous contained in ... an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration

or enforcement of the law defining the offense." Assuming such a reasonable extension were permitted by our courts,[59] would it apply to a legal opinion within the government itself? There would still be the problem of shopping around for a favourable opinion, particularly from a Department's own lawyers. It is likely, therefore, that the Courts would require as a minimum an independent opinion, such as by a person officially designated by the Department of Justice.

These issues were raised in the appeals of John Ehrlichman and others on a charge of conspiracy relating to the break-in of Ellsberg's psychiatrist. (Ellsberg, it will be recalled, had leaked the Pentagon Papers.) Those who executed the break-in (Barker and Martinez, the so-called "foot soldiers") were convicted at trial but were granted new trials because a mistake of law defence was not left to the jury.[60] Ehrlichman, who had ordered the break-in, was not permitted any such defence.[61] "The difference", states Philip Kurland,[62] "apparently related not to an understanding of the law, but whether the persons accused were executing orders or issuing them." The reversals of the convictions of the "foot soldiers" were put on different bases by the two members of the District of Columbia Circuit Court of Appeals who were in favour of reversing the convictions. Judge Wilkey held that because the "foot soldiers" were outsiders assisting an agent of the White House, they were entitled to act in objective good faith on the facts known to them:[63]

> I think it plain that a citizen should have a legal defense to a criminal charge arising out of an unlawful arrest or search which he has aided in the reasonable belief that the individual who solicited his assistance was a duly authorized officer of the law.

The defence, therefore, as stated by Wilkey J., would seem to be a narrow one and inapplicable to a police officer. Judge Merhige's judgment has a wider application: the defence extends "to cases of reliance on official advisory opinions"[64] and "applying the defense to the facts of this case, the record discloses sufficient evidence of reliance on an official interpretation of the law for the matter to have been submitted to the jury."[65] Judge Leventhal dissented, stating[66] that the "official interpretation" defence

> is justified by its twin underlying assumptions that the official is one to whom authority has been delegated to make pronouncements in a field of law, and that the authority can be held accountable by explicitly grounding it in the hands of an identifiable public-official or agency. So grounded, the interest of both private citizens and government is served by protecting actions taken in reliance on that interpretative authority. But *none* of these safeguards of regularity is present in this case.

The decision, with the different bases for judgment, is not an easy one to understand.[67] The principles discussed in it, however, will clearly be important if prosecutions are brought against R.C.M.P. officials for illegal surreptitious entries. There is a reasonable possibility that our courts would adopt the principle of the A.L.I. defence of reasonable reliance on an official interpretation of the law, but how it should be applied in any specific case is not at all clear.

F. *Superior Orders*

Closely connected with mistake of law is the potential defence of "superior orders." Can a subordinate policeman rely on the orders of his superior to justify his actions? The answer would seem to be no, although it may be that a superior order can provide a defence when it brings about a mistake of law in a case where the accused person thought that his own conduct was therefore lawful. A defence is clearly available if the superior order brings about a mistake of fact in a case where mens rea is required.[68]

Glanville Williams has written[69] that "it is an established principle of constitutional law that official position and superior orders (whether of the Crown or of a private master) are not in themselves a justification for committing an act that would otherwise be a legal wrong." Lord Salmon, delivering the opinion for the Privy Council in the duress case of *Abbott* v. *The Queen* (1976),[70] stated that superior orders "has always been universally rejected. Their Lordships would be sorry indeed to see it accepted by the common law of England."

Willes J., however, in an obiter opinion over a century ago, thought a superior orders defence was possible:[71]

> I believe that the better opinion is, that an officer or soldier, acting under the orders of his superior — not being necessarily or manifestly illegal — would be justified by his orders.

This "better opinion" should now be contrasted with the British Manual of Military Law[72] which states:

> The better view appears to be, however, that an order to do an act or make an omission which is illegal, even if given by a duly constituted superior whom the recipient is bound to obey and whether the act or omission is manifestly illegal or not, can never of itself excuse the recipient if he carries out the order, although it may give rise to a defence on other grounds, e.g., by negativing a particular intent which may be a complete defence or reducing the crime to one of a less serious nature, or by excusing what appears to be culpable negligence.

This was a change introduced in the Manual in 1944, perhaps in anticipation of a similar denial of the defence in the Nuremberg Charter of 1945 with respect to German war crimes.[73] There is no similar provision, however, in the Canadian Regulations[74] and, moreover, a provision in the Regulations[75] appears to suggest that there is such a defence by stating that "where the subordinate does not know the law or is uncertain of it he shall, even though he doubts the lawfulness of the command, obey unless the command is manifestly unlawful." The defence is, therefore, not clear even with respect to the military.

When one moves outside the military area it is even less likely that the defence would apply. It would not apply to an employee obeying the unlawful order of his employer.[76] But would it apply to policemen obeying the orders of their superiors? In a case in 1947 Lord Goddard stated, obiter, with respect to an entrapment situation:[77] "I hope the day is far distant when it will become a

common practice in this country for police officers to be told to commit an offence themselves for the purpose of getting evidence against someone; if they do commit offences they ought also to be convicted and punished, for the order of their superior would afford no defence." The point was not argued by counsel, however, and in any event, it could be regarded as a public statement that in the future it will not be considered reasonable to rely on a superior order in such a case. Glanville Williams stated[78] that "it would not be surprising to find the rule confined [to the armed forces] for part of the rationale of the rule is the need for military discipline requiring prompt obedience." On the other hand, Louis Schwartz,[79] the research director of the Brown Commission, puts the argument that "it would amount to entrapment for society to train and arm men for law enforcement duties, place them in quasi-military subordination to superiors, and then prosecute them for conforming to plausible commands." But a police officer is not liable to the same drastic penalties for disobeying orders[80] as is a soldier in wartime, nor is a soldier entrusted with the duty of upholding and enforcing the law, as is a police officer.[81] Consequently the military analogy is not a true one.[82]

A defence of superior orders does, however, apply in one situation, suppression of riots. Section 32 of the Code provides that unless the order is "manifestly unlawful" a military person can obey any command of his superior officer[83] and similarly anyone can obey a peace officer[84] in suppressing a riot. The very fact that the Code sets out this specific application of the defence is some indication that the defence is not applicable in other cases, particularly when other commonwealth Codes have specifically adopted a wider provision.[85] A Queensland judge in interpreting their section stated[86] that the defence applies to "a soldier or sailor, a constable, a gaoler." It is likely, therefore, that in Canada superior orders will not provide a defence for police officers in cases which would not otherwise be covered by mistake of law.[87] This accords with Smith and Hogan's conclusion[88] that "if mistake of law does not afford a defence where it is reasonable on other grounds, it should not, in principle, afford a defence because it is reasonable as arising from the orders of a superior."

The difference between a superior order defence and a mistake of law defence is in essence the height of the hurdle the accused must overcome. In the superior order defence such as that available in Queensland, he need only show that the order was not "manifestly unlawful," a very lenient criterion;[89] whereas in a mistake of law defence, assuming it is accepted in Canadian law in these circumstances — a very large assumption — the accused would have to show reasonable reliance on the legality of the order which brought about the mistake of law as to the lawfulness of his own conduct. There would, of course, rarely be an explicit legal opinion; rather, the opinion would be implicit in the order and the authority of the person giving it. Moreover, the courts could not expect an outside legal opinion; the implicit statement of the legality of the activity by the subordinate's superior would have to be considered, in appropriate cases, the equivalent. Although in many cases the result will be the same, in others the difference in emphasis will produce a different result. It really boils down to the question whether one wants officers

to question the legality of doubtful orders. I would think our courts will say "yes" for peace officers — except perhaps as the Code now states in cases of dire emergency such as riots or armed uprisings — for it is the function of peace officers to uphold the law, and they must be seen to do so, even as against their superiors. The subordinate would therefore be liable if he obeyed an order that he thought was doubtful, but would be protected if he obeyed one which he reasonably believed made his conduct lawful. In any event it would still be possible, as in the *Ehrlichman* case,[90] to prosecute the person who gave the illegal order.

VII. Emergency Powers

Wider powers can be assumed by the Government in certain emergency situations. These powers are outlined in this section. One form of emergency situation, riot, has already been discussed. In this section we look at the right to call in the military in aid of the civil power, the very drastic military operation that goes under the name of martial law, special ad hoc emergency legislation, and the War Measures Act. Finally, there will be a discussion of the desirability of an intermediate position between the existing criminal law and the War Measures Act.

A. *Calling in the Military*

Under the National Defence Act[1] the military can be called in by a provincial government if a disturbance is "beyond the powers of the civil authorities to suppress, prevent, or deal with."[2] Troops have been used on a large number of occasions including the labour disturbances in Quebec City in 1878 and Cape Breton in 1923 and the Winnipeg General Strike in 1919.[3] The troops were, in fact, called in by the Mayor of Winnipeg because under the Militia Act of 1906[4] the mayors or wardens of municipalities then had the right to call in the militia.[5] Department of National Defence records show[6] that between 1876 and 1914 the militia were called to the aid of the civil power on forty eight separate occasions, mainly to intervene in strikes. The controversial question was not about the right to call in the military, but who would pay. Armed forces have also been used to quell prison riots such as those in recent years at the Kingston and Milhaven penitentiaries.

Although a member of the armed forces is not ordinarily a peace officer (except when enforcing military law),[7] he is considered to be one when called in aid of the civil power under the National Defence Act.[8] Section 239 of the Act provides:

> "Officers and men when called out for service in aid of the civil power shall, without further authority or appointment and without taking oath of office, be held to have and may exercise, in addition to their powers and duties as officers and men, all of the powers and duties of constables, so long as they remain so called out, but they shall act only as a military body, and are individually liable to obey the orders of their superior officers."

Note that the section states that "they shall act only as a military body." Nevertheless, this restriction has been interpreted by the Law Officers of the Crown to permit the military to engage in duties ordinarily performed by members of a police force.[9] Perhaps to clarify this issue, but more importantly to ensure that troops can be considered peace officers even if not called in by a province under the National Defence Act, an amendment to the Criminal Code was enacted in 1972 which provides that "peace officer" includes "officers and men of the Canadian Forces who are ... employed on duties the Governor in Council, in regulations made under the National Defence Act ... has prescribed to be of such a kind as to necessitate that the officers and men performing them have the powers of peace officers."[10]

The Federal government is not specifically included in the section on "aid to the civil power." It is not clear how far the Federal government itself can go in using federal troops. In the Quebec City anti-conscription riots of 1918 the Quebec authorities made no requisition for armed forces, but the Commanding Officer moved his troops in to restore order. A week later, however, the Federal government issued a regulation under the War Measures Act authorizing such interventions.[11] Could the Federal government use troops in a similar manner in peacetime? To guard a federal building, to enforce a federal statute, to enforce the Criminal Code?[12]

B. *Martial Law*

Martial law operates when the military has taken over the normal judicial functions. It is the most drastic form of emergency power that can be exercised.[13] Martial law has not existed in England since 1628,[14] but has operated in the past in a number of colonial areas, including Canada. Martial law was declared during the War of 1812[15] and following the 1837 rebellion.[16] One of the most important statements on martial law arose out of the opinion expressed by the English Law Officers of the Crown in 1838[17] concerning the right of the Governor of Lower Canada to declare martial law as a result of this uprising. Their opinion was that "the Governor of Lower Canada has the power of proclaiming, in any district in which large bodies of the inhabitants are in open rebellion, that the Executive Government will proceed to enforce martial law." They went on to state that this power "does not extend beyond the case of persons taken in open resistance, and with whom, by reason of the suspension of the ordinary tribunals, it is impossible to deal according to the regular course of justice."

Necessity is the test. As Chief Justice Cockburn stated in charging the jury in connection with the Jamaican rebellion in 1867,[18] martial law "is founded upon the assumption of an absolute necessity — a necessity paramount to all law, and which, lest the commonwealth should perish, authorizes this arbitrary and despotic mode of proceeding."

American law also requires this form of extreme necessity. In *Ex parte Milligan* in 1866 the United States Supreme Court[19] declared that a private citizen may not be tried by a military tribunal during a rebellion when he is not

in an insurrectionary part of the country and the civil courts are open.[20] President Lincoln in declaring martial law had ignored orders from Chief Justice Taney.[21]

English and Commonwealth courts have been reluctant to adjudicate in these cases during the crisis;[22] and after the uprising has been quelled there is usually an indemnity Act protecting those who acted in the emergency.[23]

There is no doubt that martial law still may operate in England either as part of the prerogative or as a common law right to act in an emergency similar to self-defence in the case of an individual.

May martial law also operate in Canada? An argument can be made that the existence of the War Measures Act in Canada has taken away the right to declare martial law in the same way as the Crown's prerogative is eliminated whenever the legislature moves in to cover an area. A 1921 Irish case[24] took this view and held that where emergency legislation is passed the common law doctrine of martial law is superseded. But it is far more likely that a Canadian court would say — assuming the matter were ever tested — that there is scope for martial law in Canada if the emergency legislation should prove inadequate.[25] Because of the breadth of the War Measures Act this situation is not likely ever to arise. In fact, a form of martial law is permitted under the Act. Under section 3(2) the order and regulations passed under the Act "shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe" and this would seem to allow the military to try the cases if regulations so provided. In 1918 such a regulation was passed to deal with the previously mentioned anti-conscription riots in Quebec City, but the power was never used.[26] However, this form of martial law permits the military courts to deal only with offences under the War Measures Act and these must be limited to a five year penalty.[27] Thus if the regular courts were not operating it would be necessary to use martial law to deal with treason and other offences under the Code. Another situation where martial law could operate would be if a sudden emergency, such as a nuclear attack, destroyed the Government's power to invoke the War Measures Act and pass regulations under it.

C. *Ad Hoc Emergency Legislation*

Throughout English history ad hoc emergency legislation has been enacted to deal with specific situations. A number of statutes have extended the law of treason for a limited period of time,[28] and a series of Acts have suspended habeas corpus.[29] The first habeas corpus suspension Act was in 1688 and a number were passed in the 18th century. Habeas corpus was suspended in Lower Canada in 1797.[30] The effect of these suspensions was to increase the period of time for which a person could be held without trial.[31] The practice, which was applied to treason and usually limited to one year, ceased during the 19th century.[32]

The history of the ad hoc emergency legislation relating to Ireland is a detailed one and cannot be told here.[33] A series of Government Reports

including reports by Sir Edmund Compton, the Ombudsman,[34] Lord Parker of Waddington,[35] Lord Scarman,[36] Lord Diplock,[37] and Lord Gardiner[38] show and even add to the complexity of the matter.

Recent English legislation relating to England itself should, however, be mentioned, that is, the Prevention of Terrorism (Temporary Provisions) Act,[39] first enacted in 1974[40] following the Birmingham bombings and reenacted in 1976. The legislation, aimed at I.R.A. activities in England, was due to expire on March 24, 1978 but has been extended from year to year. The legislation proscribes the I.R.A., permits exclusion orders, and increases police powers. The police can arrest on reasonable suspicion and hold for 48 hours which can be extended by the Secretary of State for a further five days.[41] It is interesting to note that the police, according to Sir Robert Mark,[42] the former Commissioner of the Metropolitan Police, did not seek the legislation. "It was introduced," according to Sir Robert, "by the Home Secretary because he felt a need to reassure the public of the willingness of the government to take firm measures in the face of Irish terrorism." One of the main objects of the Act was to prohibit the solicitation of financial and other support for I.R.A. activities.[43] Lord Shackleton reviewed the operations of the Acts at the request of the Home Secretary and reported in August, 1978[44] that the Act had achieved that objective, stating:[45] "As a result of [the Act] the public displays, processions, funerals and collections on behalf of the I.R.A. have effectively ceased. The temper of public feeling has moderated considerably as a result. There is, I believe, little doubt about this." Lord Shackleton concluded his analysis of the legislation with his judgment that[46] "while the threat from terrorism continues, the powers in this Act cannot be dispensed with." He recommended that the legislation should continue in much the same form as at present, being renewable from year to year. He did, however, recommend an improvement in the procedures with respect to detention and questioning, and the provision of a systematic review of exclusion orders. The one change recommended was that it no longer be an offence to fail to disclose information about terrorism.

The Canadian Public Order (Temporary Measures) Act[47] which in December 1970 replaced the regulations under the War Measures Act can be considered ad hoc legislation. We now turn to the War Measures Act.

D. *War Measures Act*

The origin of the War Measures Act was the need for special powers when the First World War broke out on August 4th, 1914. The U.K. passed its special legislation, the Defence of the Realm Act, known as DORA, on August 8th. It took some time for the Canadian Parliament to assemble; the first session to discuss emergency legislation was not held until August 19th. The Act was quickly passed without dissent on August 21st with just over half an hour of debate[48] and received the Royal Assent on August 22nd. In the meantime the government had already acted to cope with the emergency, such as detaining enemy ships, and the Act validated these actions.[49]

The Canadian War Measures Act followed much the same pattern as DORA, giving the executive broad power to pass regulations. It was, however, more all-embracing than the U.K. legislation, and allowed the executive to make orders and regulations deemed "necessary or advisable for the security, defence, peace, order and welfare of Canada."[50] The regulations were to be in force only during "war, invasion, or insurrection, real or apprehended,"[51] but "the issue of a proclamation" by the Government was "conclusive evidence that war, invasion, or insurrection, real or apprehended, exists ...."[52] The draftsman of the Act, William F. O'Connor,[53] later stated[54] that it was drafted in this form because "no man could foresee what it would need to contain to be effective and ... the only effective Act would be one of a "blanket" character, whereunder the Government could act free of question between Parliaments." The Canadian Act was also more stringent than the English Act, permitting penalties of up to 5 years for breaches of the regulations compared to a 3 month penalty in England. Moreover, the Canadian Act permitted courts-martial of civilians, whereas in England this was not permitted except under very limited circumstances.[55]

The U.K. legislation expired about a year after the end of the War, whereas the Canadian Act was never repealed. It is not clear whether the original intent was to make the Canadian Act a permanent one.[56] By way of contrast, "DORA" specifically applied only "during the continuance of the present war."[57] The language of the Canadian Act has specific reference to the existing hostilities; yet it refers to "war, invasion, or insurrection, real or apprehended" and if it was only to last during the war there would have been no need to refer to anything but war. So it is likely that the Government intended to keep the statute on the books. It may be that the reach of the Act was altered during its passage. The resolution introducing the Act referred to the issue of a proclamation only as "conclusive evidence that war exists,"[58] whereas the legislation that was passed a few days later made the proclamation "conclusive evidence that war, invasion, or insurrection, real or apprehended, exists ... ."[59] If, indeed, there was any thought of repealing the Act, the Winnipeg General Strike in 1919 would have convinced the Government that it was a desirable Act to have available.[60]

It is not clear how the crucial words "insurrection, real or apprehended" came into the Act.[61] As noted above, the words are not found in the U.K. legislation. However, there is a very good chance that the language was borrowed from the Militia Act of 1904[62] which had defined the word "emergency" to mean "war, invasion, riot or insurrection, real or apprehended."[63] Another Canadian Act passed the very same day as the War Measures Act, the Finance Act, 1914,[64] allowed the Government to issue certain proclamations (authorizing, for example, a debt moratorium and other measures to prevent a run on financial institutions) in case of "war, invasion, riot or insurrection, real or apprehended ... .[65] This is the very same language that had been employed in the Militia Act. In the War Measures Act, however, the word "riot" was dropped. Thus the phrase "apprehended insurrection" was used in legislation a decade before the passage of the War Measures Act.

Just before the English legislation expired special ad hoc legislation was passed relating to Ireland (Restoration of Order in Ireland Act[66]) as well as permanent emergency legislation relating to essential services. The permanent legislation, the Emergency Powers Act of 1920,[67] permitted regulations to be passed if the essential services of the country, for example, the supply and distribution of food, water, fuel or light, were threatened.[68] These regulations have to be laid before Parliament and will expire after seven days unless a resolution of both Houses continues them. There are three limitations set out in the Act: there can be no conscription; to strike cannot be made an offence; and the regulations cannot alter existing criminal procedures. This last limitation would make the Act inappropriate for use during an insurrection because the government in such a case would want a widening of police powers of arrest and search. The Act has been used in cases of labour unrest. It was first invoked in 1921 and since then in at least ten other cases[69] including an eight month period during the 1926 General Strike.

The War Measures Act was, of course, invoked for the Second World War. This time Canada had its emergency regulations ready. Indeed, the Act was invoked on September 1st, 1939, prior to the formal Declaration of War on September 3rd. The Regulations were prepared by a Standing Interdepartmental Committee on Emergency Legislation set up in 1938.[70] A Treachery Act was passed a short time later[71] to allow for prosecutions for major espionage and other serious cases. After the war special transitional Acts were passed from year to year until 1951.[72] In 1951, following the outbreak of the Korean War, the Emergency Powers Act was passed,[73] which expired in 1954.

The War Measures Act was amended in 1960 by the Act which introduced the Canadian Bill of Rights.[74] The amendment substituted a new section 6 which provides that a proclamation invoking the Act "shall be laid before Parliament forthwith after its issue, or, if Parliament is then not sitting, within the first fifteen days next thereafter that Parliament is sitting."[75] This section further provides for Parliamentary debate of a motion, when instituted by ten members, "praying that the proclamation be revoked,"[76] and, if both Houses so resolve, that the proclamation shall cease to have effect.[77] The new subsection 6(5) of the War Measures Act provides that anything done under its authority "shall be deemed not to be an abrogation, abridgement or infringement of any right or freedom recognized by the *Canadian Bill of Rights.*" Lester Pearson, then leader of the Opposition, maintained that an effective Bill of Rights should restrict certain powers of the executive even in an emergency. He submitted that the governor in council should be expressly forbidden to act under the War Measures Act to deprive any Canadian citizen of his citizenship or to banish or exile any citizen in any circumstances. He further proposed a "limitation by law on the absolute and arbitrary power of the government to detain persons, even in wartime," but stopped short of recommending that detention without an early trial on properly laid charges should be expressly forbidden.[78] These proposals were not accepted, however. Prime Minister Diefenbaker pointed out that the government's amendments "assured parliamentary control which has not previously existed under the War Measures Act."[79] Moreover, he suggested that a parliamentary

committee should later be established to examine the operation of the War Measures Act.[80] Such a committee was never set up.

The War Measures Act has been invoked only three times, the third time being on October 16, 1970 during the Cross/Laporte crisis. I will leave it to others to analyze whether the invocation of the Act was, in fact, necessary or was done more for psychological reasons. Similarly I will leave it to others to determine whether there was, in fact, an apprehended insurrection at the time.

It was, no doubt, a crisis situation and the government wanted special powers to deal with it. In the first place they wanted to create the offence of membership in the F.L.Q. We have already seen examples of similar legislation in the notorious section 98 of the Code and in wartime regulations.[81] The government obtained special powers to deal with this target group: power to arrest without warrant on suspicion,[82] to hold without bail[83] and to search on suspicion.[84] Moreover, the regulations made members of the Armed Forces peace officers for the enforcement of the regulations.[85] These regulations were replaced on December 1, 1970 with a special Emergency Act, the Public Order (Temporary Provisions) Act,[86] which was very similar to the regulations, but with certain Bill of Rights safeguards made applicable.

One feature of the Regulations passed in October 1970 and of the later Public Order Act deserves special mention and that is the quasi-retroactive nature of the regulations. They were brought in at four in the morning and persons were then arrested and charged with being members of the F.L.Q. before they had a chance to renounce their membership. During the Second World War the government gave notice of the groups that were to be proscribed and this gave persons an opportunity to leave the organizations. The recent and comparable English legislation proscribing the I.R.A. also handled this matter in a sensible way by stating[87] that "a person belonging to a proscribed organisation shall not be guilty of an offence under this section by reason of belonging to the organisation if he shows that he became a member when it was not a proscribed organisation and that he has not since he became a member taken part in any of its activities at any time while it was a proscribed organization." It was the absence of such a provision in Canada which enabled the police to arrest so many persons.[88]

The Courts have not allowed litigants to challenge the Government's proclamation that war or insurrection, real or apprehended exists.[89] The wisdom of using the Act is, therefore, left to the political process. The Bill of Rights cannot be used because the War Measures Act is specifically exempted from its operation. Moreover, in both World Wars the Courts have tended to interpret the regulations in the government's favour.[90]

E. *Is an Intermediate Position Desirable?*

Should the Government introduce legislation which is less drastic than the War Measures Act? The government had proposed in 1971[91] that a Special Joint Committee of the Senate and House "report upon the nature and kind of legislation required to deal with emergencies that may arise." However, the

Committee was never set up, probably because the Opposition wanted the Joint Committee to examine the facts surrounding the use of the War Measures Act in October, 1970. In 1975 the Government indicated that legislation was going to be introduced on the subject,[92] but no such legislation has yet been brought forward.

Would such an Act be desirable? Presumably it would specify certain emergency powers relating to proscribed organizations and to arrest, bail and search which could be invoked by the government without prior parliamentary approval when there was a serious threat to the internal security of the country.

There is much force in the position taken by the Canadian Civil Liberties Association in opposing new intermediate legislation:[93] "For the very reason that it is so politically difficult to invoke it is preferable that a Government have to choose between the enforcement of existing criminal legislation and the invocation of the War Measures Act." If special legislation is needed to deal with a particular emergency it can, as in England with respect to I.R.A. terrorism, be passed by Parliament. Indeed, a good argument can be made that all threats to internal security, particularly those that are still in the "apprehended" stage, should be handled by the regular criminal law and by ad hoc emergency legislation. The War Measures Act could therefore be restricted to war and invasion, real or apprehended, and possibly also to actual insurrection. In the case of "apprehended" insurrection there would still be time to introduce special legislation. Because of the new closure rules in Canada introduced in 1969[94] time limits can now more easily be put on the length of legislative debates than was formerly the case. These closure rules had not yet been tested in 1970.

Another change between 1970 and today which makes emergency legislation less necessary is that army personnel, as we have seen, can be designated by Order-in-Council as peace officers under the Code, whether or not a request has been made by a province. The existing criminal law gives peace officers relatively wide powers of arrest and search. The growing world-wide threat of terrorism can be handled through a number of specific enactments, such as those relating to the trial of persons involved in hijacking[95] or the special emergency legislation relating to immigration that was in force during the 1976 Montreal Olympics.[96] It is no longer necessary for the Federal government to give the provinces and municipalities emergency power to prohibit assemblies — a power which was thought not to exist at the time of the invocation of the War Measures Act — because the Supreme Court of Canada in early 1978 in *Attorney-General of Canada* and *Dupond*,[97] by a majority, upheld a Montreal by-law permitting the banning of parades. The decision upheld a section of the by-law which allowed the Executive Committee, when there are "reasonable grounds to believe that the holding of assemblies, parades or gatherings will cause tumult, endanger safety, peace or public order" to prohibit the holding of them "at all times or at the hours it shall set." Perhaps the one emergency power that might be added to the Criminal Code would permit a High Court judge or possibly a panel of High Court

judges at the request of the Government to issue a search warrant for a short period of time, possibly a few days, to conduct searches in defined areas based on less than reasonable and probable belief — or even less than reasonable suspicion — if there were a serious threat to public safety caused, for example, by the illegal possession of explosives or other dangerous substances.[98] This would permit the police to search cars and buildings more widely than the existing law would now permit in the case, for example, of terrorist bombings (including the threatened use of nuclear weapons), or the theft of nuclear materials.[99] An emergency provision such as this could also cover the search for victims of a kidnapping, as in the Cross/Laporte cases. Note that this would only widen the right to search under a judicial warrant, not the right to arrest or detain.

To what extent should emergency legislation be subject to the Canadian Bill of Rights? The War Measures Act specifically excludes the application of the Bill of Rights.[100] The Federal Constitutional Amendment Bill introduced in Parliament on June 20, 1978 implicitly preserved this position[101] in clause 25 which provides:

> "Nothing in this Charter shall be held to prevent such limitations on the exercise or enjoyment of any of the individual rights and freedoms declared by this Charter as are justifiable in a free and democratic society in the interests of public safety or health, the interests of the peace and security of the public, or the interests of the rights and freedoms of others, whether such limitations are imposed by law or by virtue of the construction or application of any law."

The Joint Committee on the Constitution recommended[102] in October, 1978, that "Clause 25 should be replaced by a clause which exactly specifies permissible limitations on protected rights and freedoms by the War Measures Act or similar legislation ... ." "We do not see," stated the Committee, "how the state could ever be justified in imposing cruel and unusual punishment."

Both the European Convention on Human Rights, 1950,[103] and the International Covenant on Civil and Political Rights, 1966,[104] permit the overriding of rights in time of "public emergency threatening the life of the nation."[105] But in both Conventions certain rights cannot be overridden in any circumstances.[106] In the case of the International Covenant, to which Canada acceded on May 19, 1976,[107] these are the right to life,[108] the protection against cruel, inhuman, or degrading treatment or punishment,[109] the protection against slavery,[110] against imprisonment for debt,[111] against punishment for acts made crimes retroactively,[112] the right of every individual to be recognized as a person before the law,[113] and the right to freedom of thought, conscience and religion.[114] Canada is not, of course, limited to these specific exceptions. One objection to specifying provisions that cannot be overridden is the implication that others can be disregarded with impunity. For example, the International Covenant permits derogation in times of emergency from Article 9 which provides in part that "No one shall be subjected to arbitrary arrest or detention." Since Canada is bound by this approach on an international basis and could be the subject of an international complaint,[115] careful consideration must be given to it in the drafting of any emergency legislation.

It was suggested above that a threat to internal security which is still at the stage of an apprehended insurrection be handled by the regular criminal law and ad hoc emergency legislation. If this approach is taken, it would be desirable to have *draft* legislation ready for enactment by Parliament should an internal emergency arise. This draft legislation should have undergone a thorough discussion and analysis by, say, the Justice and Legal Affairs Committee at a time when there is *no* emergency facing the country. This analysis would have no legal effect. The draft would remain a draft — to be enacted by Parliament if an emergency were to arise. The draft Act could include a number of options, both in terms of powers and safeguards, which Parliament could then enact depending on the nature of the emergency. Another possibility is to enact the legislation setting out the range of options, but require Parliament itself, rather than the Executive, to proclaim the parts of the Act which should be brought into operation.

Part Five
THE ROLE OF THE JUDICIARY

One question running through all the previous sections concerns the role of the judiciary in national security matters. Should the final decision rest with the executive, or should the judiciary play a role? The then Prime Minister, Pierre Trudeau, stated in the House in January, 1978:[1]

> "In our system, the executive is responsible for making executive decisions regarding the secrecy that is needed for the protection and security of the state."

A similar approach was later taken by the then Solicitor General, Jean-Jacques Blais, before the Justice and Legal Affairs Committee in discussing the Government's proposed mail-opening legislation:[2]

> "During the debate in the House of Commons some honourable members will find that the Solicitor General of Canada might not be the most appropriate authority in whom to vest the power to issue warrants allowing the opening of first-class mail for national security purposes. It is the view of this government that the responsibility for the protection of the national security of this country rests in the final analysis with the executive branch of the Government of Canada. And that responsibility is exercised in part by the delegation of authority over the RCMP and its security service to the Solicitor General. The government would indeed be remiss to allow the fragmentation of this most vital responsibility by supporting the view that the authority required to discharge it should be dispersed among several institutions."

This approach was consistently followed by the former Government in all areas. As we have seen, section 41(2) of the Federal Court Act enacted in 1970 makes the Minister's affidavit conclusive on the question of Crown Privilege.[3] The amendment to the Official Secrets Act in 1974 gave the Solicitor General complete authority over wiretapping and other forms of surveillance in national security cases.[4] The invocation of the War Measures Act in 1970 was a governmental responsibility and was not subject to review by the Courts.[5] Finally, the former Government took the tentative position that the Courts should not play a role in resolving Freedom of Information conflicts.[6] We will explore each of these areas in relation to the role of the judiciary.

The danger in relying solely on the executive is that the concept of national security, as the American experience has shown, can be used for political purposes, i.e., party politics, and to discourage and suppress legitimate dissent. The Watergate Affair has made us distrustful of giving the executive the final say in national security matters. But that does not mean that the Courts must necessarily be the institution to provide the safeguard. I will leave to others the analysis of whether other institutions apart from the Courts

can play such a role.[7] Such a study would include an investigation of the use of an administrative body responsible to the legislature, the use of a special Parliamentary Committee, consultation with the leader of the Opposition, or review by selected elder statesmen. All of these techniques have some disadvantages. Here we concentrate on the use of the judiciary which has traditionally played a role in checking the power of the executive.

In the Canadian and English system of government, Parliament — even more than the judiciary — also plays such a role. The U.K. White Paper on Reform of Section 2 of the Official Secrets Act[8] suggests that "in the British context, where the policies and decisions of the executive are under constant and vigilant scrutiny by Parliament and Ministers are directly answerable in Parliament, it may be neither necessary nor desirable to proceed to legislation of a kind which may be justifiable in other and often very different contexts — for instance, that of the United States."

There are some clear advantages in using the judiciary. The institution already exists and therefore it is not necessary to set up a further bureaucratic structure. The judiciary is trusted by the public and will no doubt act in such a way as to continue to justify that trust.

But there are some disadvantages in using the judiciary. Judges tend to be relatively conservative and although they can be counted on to prevent the use of power for blatant political purposes, they may be less willing to interfere with a government's move to curtail dissent. The same arguments against using the judiciary to protect human rights through an entrenched Bill of Rights are also applicable here.[9]

Too much reliance on the judiciary in these areas may, in fact, harm the image of the judiciary and make it less effective in other areas where it must play a role such as in constitutional law. Repeatedly upholding the government's position, which is not at all unlikely, will make the judiciary seem to be an arm of the government. This is particularly so when the hearing in many cases will be conducted in whole or in part in closed or, as it will be labelled, "secret" sessions. This is necessarily so if the question to be determined is whether sensitive information is to be made public or if an application to wiretap is made. We have recently seen allegations that the *in camera* trial of Peter Treu under the Official Secrets Act was improper and unfair. This led to an open confrontation between a member of Parliament and the judge.[10] Such conflicts cannot but do considerable harm to the image of the judiciary.

Other considerations are the relative inefficiency and high cost of court procedures and the tying up of valuable judicial resources. Further, the court structure is not as secure as may be necessary, as a number of persons apart from the judge may have access to the information. Moreover, if the judiciary across the country are permitted to handle these problems there may be a lack of uniformity, unless the issue is brought to the highest court. Not all of these factors operate equally for all the categories that we are looking into. Let us now turn to each such category to see what role the judiciary should in fact play.

The role of the courts is obvious when a charge is brought involving national security. The judicial system cannot be by-passed. This is, of course, taken for granted. In prosecutions for disclosing classified information (if the present law were to be narrowed in this way) the courts should be able to determine whether the information was and is properly classified. Moreover, whether the proceedings will take place in open court is now up to the judge and not the executive. Even the *in camera* provisions of the Official Secrets Act[11] which are applicable when the evidence "would be prejudicial to the interest of the State" are not conclusive but give the judge the discretion ("may") whether the public should be excluded. Of course the Crown can then stop the prosecution if it does not want to proceed in public.

In the Crown Privilege provision of the Federal Court Act, however, the affidavit by the Minister in cases under section 41(2) is conclusive. This issue of whether the public interest in disclosure outweighs the public interest in keeping the matter secret is one that courts should determine. They now do so under section 41(1) of the Federal Court Act, and in England, following *Conway* v. *Rimmer* in 1967,[12] have the right to do so in all cases. The fact that they have a *right* to inspect the document does not mean that they will always choose to do so. To ensure that very sensitive information is not revealed to a person who has not been properly cleared, the technique offered by the Law Reform Commission of Canada in its Draft Evidence Code makes good sense. The Code provides that in certain cases the government or a party can ask the Chief Justice of Canada to designate a judge of the Supreme Court to determine the matter. Perhaps the proposed section would be improved if the government alone had this option and if the Chief Justice of the Supreme Court could designate a judge of the Federal or a Provincial Superior Court to hear and determine the matter, with a further right of government appeal, with leave, to the Supreme Court of Canada. No doubt those designated would be selected from those judges willing to undertake a full security clearance. Provision could also be made to transfer the hearing to a place with sufficient security to satisfy the government.[13] The government's ultimate safeguard against the improper revelation of important secrets would therefore be the Supreme Court of Canada.

Similar techniques for controlling security could be used in seeking warrants for wiretapping under section 16 of the Official Secrets Act. It will be recalled that the U.S. Foreign Intelligence Surveillance Act of 1978[14] provides for the Chief Justice of the United States publicly to designate seven District Court judges to hear such cases. Surveillance, which can easily be improperly used, is an area where there should be some check on the executive. Since *Entick* v. *Carrington* in 1765[15] the common law has shown great concern over executive-authorized searches. The annual reports by the Solicitor General are necessarily too vague to provide such a check. Parliament will not know about individual cases and so members cannot raise questions in the House. Moreover, there are relatively few applications for such warrants and so this would not impose a great burden on the Courts. The Solicitor General would still control the applications, but a requirement would be added that, say, a Federal or Superior Court Judge approve the search. As with wiretapping in

ordinary criminal cases, some provision for emergency warrants from the Court should be available. Judicial officers have traditionally been involved in authorizing searches and there is no sound reason why they should be excluded just because national security is involved. The one area where executive-only warrants might be justified is in searches of foreign embassies or agents of foreign powers for espionage or counter-espionage purposes. If so, as in the U.S., this should be carefully limited by law to this narrow category.[16] In such a case it might be wise to have another minister involved, such as the Minister of External Affairs. If the Solicitor General is to continue to grant warrants in cases of domestic subversion then it may be that the Minister of Justice should also be involved. There is a precedent for the safeguard of two ministers authorizing action in the Immigration Act with respect to the deportation of subversives.[17]

There is less justification for the involvement of the judiciary in the final two areas to be discussed, the invocation of the War Measures Act and the resolution of Freedom of Information conflicts.

Declaring war,[18] invoking the War Measures Act,[19] and the recognition of foreign governments[20] are the type of issues which are best left to the political process, and eventually to the electorate. Actions of the Executive can be the subject of Parliamentary scrutiny and debate and in some cases, such as the invocation of the War Measures Act, they must be.[21] No doubt the courts might be prepared to intervene if there were a blatant misuse of power, for example, if there was clearly no semblance of an emergency to justify the War Measures Act, but such a situation is not likely to arise.

There is no doubt that the judiciary could be the body to resolve Freedom of Information conflicts. Judges do so in the United States. But, on balance, it would be better to use the judiciary only to ensure that the proper procedures have been followed and not to have the judges involved in determining whether a document should be released. Unlike Crown Privilege, the question in controversy is not already before the Courts. To involve the Courts would utilize valuable judicial resources, would be more costly and time-consuming and less efficient than some less cumbersome institutions, such as an Ombudsman, or a Human Rights Commissioner, or an Information Commissioner. An institution such as one of these could report directly to Parliament. The rules for release of information, including classifications and time limits for release, could be carefully spelled out in the legislation. Once the Courts are given a major role in the process, the Information Commissioner may well become a less important and less powerful person in government than he otherwise would be. Because the cost of proceeding in a court would tend to be expensive (and it is not likely that scarce legal aid money would be used) there would be an obvious advantage to the wealthy and powerful.

Moreover, the Courts are likely to be reluctant to order the release of sensitive government information and, as previously mentioned, will necessarily hold the proceedings *in camera,* which will tend to harm the image of the judiciary. Further, the use of the judiciary might not result in as much widespread dissemination through publication of the information released as

would the actions of an administrative body. The Courts have been traditionally concerned about the parties before them, whereas a government body would be as concerned about those not represented in the hearings. There is likely to be better, and probably more, dissemination of government information by not involving the Courts than by involving them.

Part Six
CONCLUSION

This Study has a limited objective: to analyze the legal dimensions of the various ingredients that have a bearing on what is often referred to as "national security." Implicit in the analysis is the assumption that there have been, are, and will continue to be serious threats to the security of Canada. Inherent in the subject matter is the danger that attempts to meet these threats may involve conduct which unnecessarily threatens civil liberties.

The task of finding the proper route through this maze, one which protects the security of the nation and yet does not unnecessarily encroach on civil liberties, is not an easy one. I believe, however, that it will be easier to plot that route if the legal dimensions of the subjects are better understood.

The law, however, is only one part of the solution. Those designing a proper system must also consider the equally important questions of the structure of the security system, the training of those involved, and the relationship between the security service and the government. These matters are barely touched on in this study. It is the law that is explored here.

We expect the police to obey the law. But it is difficult for them to do so if the law is vague and uncertain, as it presently is. Thus, clarification of the present law is necessary, whatever other changes are made to the security system. But more than clarification is needed and this study catalogues a number of changes that should be made in the law. What follows is a synopsis of some of the major changes recommended.

Part Two of the Study looked at Criminal Code offences as well as the espionage sections of the Official Secrets Acts.[1] A number of suggestions were made for improving the definition and scope of these provisions. The offence of sedition should be restructured or even eliminated entirely from the Code. As a minimum, the important limitation on the offence of sedition enunciated by the Supreme Court of Canada in the *Boucher* case[2] requiring an intention to incite to violence should form part of the Code. A number of aspects of the law of treason could be improved, including more carefully dealing with the question of illegal secession. Riot and the powers associated with that offence should be modernized.

The Official Secrets Act sections relating to espionage should be transferred to the Criminal Code where they properly belong. The treason provision relating to espionage could be integrated with these sections. Consideration should be given to eliminating the presumptions now applicable to espionage, permitting the accused to elect a jury trial in all cases, and setting out with

greater precision the type of state interest to be protected. The type of information covered by the espionage laws requires clarification. It is not clear now whether all information is subject to the Act or only secret information — or some intermediate position. A number of possible formulations to cover this question are described in the Study.

The so-called "leakage" section of the Official Secrets Act is examined, along with a number of other aspects of government information, in Part Three of the Study. Changing the Official Secrets Act is a necessary psychological precursor to open government. The leakage section is now far too all-encompassing and provides far too high a penalty. Criminal liability should be confined to a narrow range of cases which are spelled out in the legislation. Offences relating to improper disclosure could be transferred to the Criminal Code or to a new Act, perhaps simply named the Government Information Act. This Act could make it clear that divulging information is not an offence if there is implied authority to communicate it. Classification procedures could be included in the legislation, as could a number of related matters such as Crown Privilege and access to archival records. New Freedom of Information provisions would also form a natural part of such legislation.

Police powers relating to national security are dealt with in Part Four. A number of concepts such as the Royal Prerogative, the "act of State" doctrine, and the rule that the Crown is not bound by statutes are explored and rejected as bases for justifying such activities as surreptitious entries. Moreover, the defence of necessity and the concept of "superior orders" should have no application to police officers in such cases. Mistake of law offers the possibility of an excuse in a limited range of cases, but it is uncertain how the courts would deal with that defence.

A number of specific police powers are examined in Part Four. The potentially wide scope for the interception and seizure of communications with a Solicitor General's warrant under section 16 of the Official Secrets Act can be contrasted with the more carefully controlled procedures in recent American legislation. The U.S. legislation could serve as a model in the restructuring of our legislation. Techniques for controlling police infiltrators are also looked at and a number of suggested solutions are set out.

In a further section, various emergency powers are analyzed. There is now wide scope for calling in the military in aid of the civil power, although the power to do so when not requested by a province is not clear. Martial law may still have a limited potential operation when an emergency makes it impossible to operate through the normal channels. The key question whether emergency legislation less drastic than the War Measures Act[3] should be introduced is examined. The conclusion is reached that such intermediate legislation is not now necessary. Indeed, an argument can be made that all "apprehended" threats to internal security should be handled by the regular criminal law and by ad hoc emergency legislation tailored to meet the specific emergency situation. If this is so, the War Measures Act could be limited to external threats to the security of the nation as well as to actual insurrection.

Should the judiciary play a role in national security matters? In Part Five it is suggested that the judiciary should be involved in granting warrants for all electronic and other intrusive surveillance, except possibly in the narrow case of surveillance of embassies and foreign agents. A special panel of judges could hear such cases. The power to open mail in security cases should also be subject to a judicial warrant. Similarly, Crown Privilege can be dealt with by such a panel. In other areas, the judiciary should not be involved. The invocation of emergency legislation should be left to the political process. Freedom of Information legislation can probably be handled by other institutions such as an ombudsman more effectively than by the courts.

I started this study with the confession that I do not know what "national security" means. The reader may well be in the same position. But the study will have achieved its objective if there is an understanding of some of the legal issues surrounding the various matters that parade under the national security banner. And that is at least a start in helping devise sound laws and procedures for the future.

Footnotes

Part One: INTRODUCTION

(notes to pages 1-2 of text)

1. Justice and Legal Affairs, June 1, 1978 (Issue No. 34) at p. 13.

2. *Berger* v. *N.Y.* (1967) 388 U.S. 41 at p. 88.

3. See the comment of Mr. Justice Potter Stewart in *Jacobellis* v. *Ohio* (1964) 378 U.S. 184 at p. 197.

4. Cmnd. 6386, January, 1976 at p. 18.

5. Wm. & Nora Kelly, Policing in Canada (Toronto, 1976) at p. 578. See also House of Commons, Debates, September 21, 1971, at p. 8026 *et seq.*

6. R.S.C. 1970, c. R-9.

7. S. 44(e) of the R.C.M.P. Regulations and Orders (1960) (unpublished). See the Report of the Royal Commission on Security (Abridged) June, 1969, known as the Mackenzie Report, pp. 14 and 15. There are also Standing Orders made by the Commissioner under section 21 of the Act which provide for the making of "rules, to be known as standing orders, for the organization, training, discipline, efficiency, administration and good government of the force."

8. See the Final Report of the U.S. Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities, (The Church Committee), Book II, Intelligence Activities and the Rights of Americans, 1976, at p. 296: "Establishing a legal framework for agencies engaged in domestic security investigation is the most fundamental reform needed to end the long history of violating and ignoring the law. . . . The legal framework can be created by a two-stage process of enabling legislation and administrative regulations promulgated to implement the legislation." The Church Committee was established in January 1975 to "conduct an investigation and study of governmental operations with respect to intelligence activities and the extent, if any, to which illegal, improper, or unethical activities were engaged in by any agency of the Federal Government." The Committee's final report is divided into two main volumes. Book II covers domestic activities of intelligence agencies and their activities overseas to the extent that they affect the constitutional rights of Americans. Book I covers all other activities of United States foreign and military intelligence agencies. See the Preface in Book II. Book III and later volumes contain detailed staff studies.

9. See Robin Bourne, "Notes for an Address on Violence and Political Authority," Dunning Trust Lecture, Queen's University, November 1, 1976, pp. 23-4.

10. House of Commons, Debates, October 28, 1977 at p. 394. See the similar language used by Prime Minister Trudeau in House of Commons, Debates, July 11, 1973 at p. 5499.

11. The Record of the Cabinet Decision of the meeting of March 27, 1975, can be found in Appendix C to the "Issues" paper, "Freedom and Security: an Analysis of the Policy Issues Before the Commission of Inquiry" prepared by the Director of Research, Peter H. Russell, October, 1978. See also Lord Denning's view of the function of the Security Service in his Report, Lord Denning's Report, Cmnd. 2152, September, 1963, para. 239, also set out in *R.* v. *Sec. State for Home Dept. ex parte Hosenball* [1977] 3 All E.R. 452 at p. 460.

12. See p. 4 of the R.C.M.P. Security Service's "Surreptitious Entry Public Statement" given by Ass't Commissioner Chisholm on July 25, 1978.

(notes to pages 2-3 of text)

13. Report of the Royal Commission on Security (Abridged), June, 1969, at p. 105. The full Report was submitted to the Government on September 23, 1968. For a discussion of the background to the establishment of the Commission see the section "Parliament and the Mackenzie Commission" in the study prepared for the McDonald Commission by C. E. S. Franks, Parliament and Security Matters.

14. See Kelly & Kelly at p. 591.

15. House of Commons, Debates, June 26, 1969, at p. 10636.

16. Kelly & Kelly at p. 579.

17. House of Commons, Debates, September 21, 1971, at p. 8026.

18. At p. 577.

19. At p. 510.

20. At p. 512.

21. R.S.C. 1970, c. O-3.

Part Two: CRIMINAL OFFENCES AND NATIONAL SECURITY

(notes to pages 5-6 of text)

1. R.S.C. 1970, c. C-34, as amended.

2. R.S.C. 1970, c. O-3, as amended.

3. Report of the Royal Commission on Security (Abridged), Ottawa, June, 1969, para. no. 214.

4. Then Criminal Code, s. 46(1)(e), now s. 46(2)(b). Report of the Royal Commission on Security, para. nos. 215-216.

5. Para. nos. 202-213.

6. S. 81.

7. S. 72.

8. S. 281.1.

9. S. 281.2.

10. British North America (B.N.A.) Act, 1867, s. 91(27) (the text is printed in R.S.C. 1970, Appendix II).

11. See The Police Act, R.S.O. 1970, c. 351 as amended. For example, causing disaffection among the police is made an offence in s. 69; disclosure by a police officer of information that it is his duty not to disclose is made an offence under the Schedule to Reg. 680, R.R.O. 1970; see *R.* v. *Feeley, McDermott and Wright* [1963] 3 C.C.C. 201 (S.C.C.).

12. Law Reform Commission of Canada, Report on Evidence (Ottawa, 1975), Evidence Code, s. 43, pp. 32-33.

13. See the document, Law Reform Commission Research on Police Powers, distributed at the Canadian Law Teachers Annual Meeting, London, Ontario, June, 1978.

14. Final Report of the National Commission on Reform of Federal Criminal Laws (a Proposed New Federal Criminal Code) (Title 18, United States Code) (Washington, 1971).

15. See L. B. Schwartz, "Reform of the Federal Criminal Laws: Issues, Tactics and Prospects," [1977] Duke Law Journal 171 at 197, 217, 221-2.

16. S. 1437 was passed by the Senate in January 1978, but has been stalled in the House.

17. The Law Commission (England), Working Paper No. 72, Second Programme, Item XVIII: Codification of the Criminal Law: Treason, Sedition and Allied Offences (London, 1977).

18. See the discussion of treason, *infra.*

19. 25 Edw. III, stat. 5, c. 2.

20. Stat. Can. 1953-54, c. 51, s. 46.

21. 18 U.S.C. § 2381.

22. *R.* v. *Casement,* [1917] 1 K.B. 98.

23. *Joyce* v. *D.P.P.,* [1946] A.C. 347.

24. See the Law Commission (England), Working Paper No. 72, pp. 10-11.

25. Stephen, A History of the Criminal Law of England (London, 1883) vol. 2, pp. 302,309-10; MacGuigan, "Seditious Libel and Related Offences in England, the United States, and Canada", Appendix I to The Report of the Special Committee on Hate Propaganda in Canada (Ottawa, 1966), pp. 79-81.

26. *R.* v. *Gallagher and others* (1883) 15 Cox C.C. 291. See D. Williams, Keeping the Peace (London, 1967) at p. 21.

27. See *infra,* Emergency Powers.

28. *Chandler* v. *D.P.P.* [1964] A.C. 763 (the Official Secrets Act was used against advocates of nuclear disarmament protesting at a military base).

29. 1 & 2 Geo. V, c. 28 (U.K.).

30. *New York Times Co.* v. *United States,* (1971) 403 U.S. 713. See the comment of Edgar & Schmidt in their study of the U.S. espionage statutes, "The Espionage Statutes and Publication of Defense Information," (1973) 73 Columbia Law Review 929 at p. 1078.

31. Edgar & Schmidt, "The Espionage Statutes and Publication of Defense Information", (1973) 73 Columbia Law Review 929 at p. 930.

32. Official Secrets Act, s. 16 as enacted in the Protection of Privacy Act, Stat. Can. 1973-4, c. 50, s. 6, to be discussed in detail under Police Powers and National Security; Immigration Act, 1976, S.C. 1976-7, c. 52, s. 19(1)(e) & (f), s. 27(1)(c) & (2)(c) (the word was also found in the former Immigration Act, R.S.C. c. I-2, ss. 5 & 18). *Cf.* the New Zealand Security Intelligence Service Act 1969, as amended 1977, which defines security, espionage, sabotage, subversion, and terrorism. See J. L. Robson's Report, New Zealand and Internal Security, 1978; Hancock, "The New Zealand Security Intelligence Service" (1973) 2 Auckland U.L. Rev. 1. David Williams states in his Report, The Internal Protection of National Security, at p. 18, that in the United Kingdom "there is no statute expressly related to subversive activities."

33. The word is found in the Official Secrets Act, s. 16; and the Geneva Conventions Act, schedule IV, art. 33, R.S.C. 1970, c. G-3 (the text of the "Geneva Convention Relative to the Protection of Civilian Persons in Time of War" of August 12, 1949). Terrorism was found in the Criminal Code between 1919 and 1936 in the infamous section 98 (see *infra,* the discussion of seditious organizations).

34. Espionage is mentioned in s. 16 of the Official Secrets Act, in s. 19(1)(e) of the Immigration Act, and in art. 68 of schedule IV of the Geneva Conventions Act.

35. Stat. Can. 1951, c. 47, s. 18, which created s. 509A of the Criminal Code. In the 1953-54 revision of the Code, the sabotage section became s. 52 and subsections 3 & 4, which limit the scope of the offence were added; see the House of Commons, Debates 1953-54, p. 3873.

36. William and Nora Kelly, Policing in Canada (Toronto, 1976) at p. 570.

37. Cited in Final Report of the Select Committee to Study Government Operations with Respect to Intelligence Activities, U.S. Senate, April 26, 1976, Book 2, p. 4.

38. *Ibid.* at p. 319.

39. Stephen, A History of the Criminal Law of England (London, 1883) vol. 2, p. 242.

40. Criminal Code, s. 64.

41. S. 65.

42. S. 60.

43. S. 46.

I. TREASON (notes to page 8 of text)

1. The Law Commission (England), Working Paper No. 72 (London, 1977), p. 1.

2. *R.* v. *Maclane* (1797) 26 State Trials 721.

3. McNaught, "Political Trials and the Canadian Political Tradition", in Courts and Trials: A Multidisciplinary Approach, ed. M. L. Friedland (Toronto, 1975), 137 at pp. 158-9.

4. McNaught, "Political Trials and the Canadian Political Tradition", at pp. 138-9.

5. McNaught, "Political Trials and the Canadian Political Tradition", p. 159.

6. McNaught, "Political Trials and the Canadian Political Tradition", pp. 143-6.

7. There was also a treason-like trial following the Fenian raids in 1866; the charge was not specifically treason, but under special legislation. See *R.* v. *Slavin,* (1866) 17 U.C.C.P. 205 (C.A.). He was convicted under 22 Vict. (1859), c. 98, "An Act to protect the Inhabitants of Upper Canada against lawless aggressions from Subjects of Foreign Countries at peace with Her Majesty."

8. *R.* v. *Rowens* (1914) 7 O.W.N. 467 (High Ct.);
R. v. *Snider* (1915) 34 O.L.R. 318 (C.A.);
R. v. *Nerlich* (1915) 24 C.C.C. 256 (Ont. C.A.);
R. v. *Fehr* (1916) 26 C.C.C. 245 (N.S.S.C.);
R. v. *Bleiler* (1917) 11 W.W.R. 1459 (Alberta C.A.);
Schaefer v. *The King* (1919) 58 S.C.R. 43.

9. *Snider, Nerlich, Schaefer,* and *Rowens.*

10. *Bleiler.*

11. *Fehr.*

12. *Snider, Nerlich, Fehr* (indictment quashed), *Bleiler.*

13. *Schaefer.*

14. *Rowens.*

15. Stat. Can. 1940, c. 43. The Act expired on the issuance of the second proclamation under s. 2 of the War Measures Act, i.e., the proclamation that the war, invasion, or insurrection no longer existed: see s. 11.

16. See The Law Commission (England), Working Paper No. 72, p. 30; David Williams Report, The Internal Protection of National Security, at p. 19.

17. *R.* v. *Blake* (1961) 45 Criminal Appeal Reports 292 (C.C.A.).

18. 3 & 4 Geo. VI, c. 21. See Kenny's Outlines of Criminal Law, 19th ed. (Cambridge, 1966), p. 409.

19. A 1972 charge of treason-felony against three Irishmen who were openly recruiting volunteers to go to Northern Ireland to fight in support of the Catholics was not proceeded with: The Law Commission (England), Working Paper No. 72, pp. 30-31.

20. *Joyce* v. *D.P.P.* [1946] A.C. 347 (H.L.). See also Rebecca West, The New Meaning of Treason, (New York, 1964).

21. Compare the case of *Steane* [1947] 1 K.B. 997 (C.C.A.) who was charged with the less serious offence of a breach of the Defence Regulations because he was obviously a less willing participant.

22. Criminal Code, s. 46(1)(a).

23. S. 46(1)(b).

24. S. 46(1)(c).

25. Stat. Can. 1951, c. 47, s. 3. The amendment was made necessary by the Korean War.

26. S. 46(2)(a).

27. S. 46(2)(b).

28. Criminal Code 1953-54, s. 47.

29. Stat. Can. 1974-75-76, c. 105, s. 2.

30. 25 Ed. III, stat. 5, c. 2.

31. Plucknett, A Concise History of the Common Law, 5th ed. (London, 1956), p. 444.

32. J. G. Bellamy, The Law of Treason in England in the Later Middle Ages (Cambridge, 1970), pp. 12, 14, 61-86, 100-101. The *Gerberge* case, in which highway robbery by an armed knight was considered levying war against the King, is discussed on pp. 61-3. See also Stephen, A History of the Criminal Law of England (London, 1883) vol. 2, pp. 246-7.

33. Holdsworth, A History of English Law, 3rd ed., (London, 1923), vol. 3, p. 69. For the background to the 1351 Act, see Bellamy, The Law of Treason in England in the Later Middle Ages, pp. 1-101; Plucknett, A Concise History of the Common Law, pp. 443-4; Stephen, A History of the Criminal Law of England, vol. 2, pp. 241-8. There was another category of treason called petty treason, abolished in England in 1828, which made it treason to murder your superior — i.e., a servant killing his master or a wife killing her husband! See Plucknett, A Concise History of the Common Law, pp. 441, 443, 446; Bellamy, The Law of Treason in England in the Later Middle Ages, appendix II, pp. 225-31.

34. Maitland, The Constitutional History of England, (Cambridge, 1908), p. 227. For a discussion of the statutory and judicial extensions of the law of treason in the 16th century see J. Bellamy, The Tudor Law of Treason: an Introduction (Toronto, 1979).

35. Bellamy, The Law of Treason in England in the Later Middle Ages, p. 131.

36. Stephen, A History of Criminal Law of England, vol. 2, p. 251.

37. Bellamy, The Law of Treason in England in the Later Middle Ages, p. 215.

38. Stephen, A History of the Criminal Law of England, vol. 2, pp. 263-79; The Law Commission (England), Working Paper No. 72, pp. 8, 10-12; L. H. Leigh, "Law Reform and the Law of Treason and Sedition", [1977] Public Law 128 at 131.

39. *R.* v. *Messenger et al.* (1668) 6 State Trials 879.

40. *R.* v. *Maclane* (1797) 26 State Trials 721.

41. Stephen, A History of the Criminal Law of England, vol. 2, p. 278.

42. 36 Geo. III, c. 7. See Stephen, A History of the Criminal Law of England, vol. 2, p. 279.

43. In his charge to the jury in the *Maclane* case (1797), Osgoode, C. J. mentioned that an Act had been passed "in the last session of the legislature, for the better preservation of his majesty's government." He then stated that it was not "necessary to resort to any of the powers created under that Act" in the *Maclane* case (26 State Trials 721 at 722).

44. 11 & 12 Vict. c. 12. See Stephen, A History of the Criminal Law of England, vol. 2, pp. 279-80.

45. Stat. Can. 1868, c. 69, s. 5.

46. Kenny's Outlines of Criminal Law, 19th ed. (Cambridge, 1966), p. 403.

47. The Law Commission (England), Working Paper No. 72, p. 32.

48. 18 U.S.C. § 2381.

49. U.S. Constitution, Art. III, s. 3. See the Working Papers of the National Commission on Reform of Federal Criminal Laws (1970), vol. 1, p. 420.

50. See J. W. Hurst, "Treason in the United States", (1945) 58 Harvard Law Review 226, 395, 806; reproduced with additional material in Hurst, The Law of Treason in the United States (Westport, Conn., 1971).

51. Final Report of the National Commission on Reform of Federal Criminal Laws (Proposed New Federal Criminal Code), § 1101. See also Working Papers of the National Commission on Reform of Federal Criminal Laws (1970), vol. 1, pp. 419-30, 462.

52. Criminal Code, s. 46(3).

53. *Joyce* v. *D.P.P.* [1946] A.C. 347.

54. See Biggs, "Treason and the Trial of William Joyce," (1947) 7 U. of Toronto Law Journal 162; G. L. Williams, "The Correlation of Allegiance and Protection," (1948) 10 Cambridge Law Journal 54; and Trial of William Joyce, Notable British Trials (vol. 68) (London, 1946), pp. 35-6.

55. The Law Commission (England), Working Paper No. 72, p. 33.

56. Under the 1751 Act aliens who were properly in Canada could be convicted for treasonous offences within Canada: see *R.* v. *Maclane* (1797) 26 State Trials 721 at 799. Alien persons who were *clandestinely* in England during the war did not owe local allegiance and therefore could not be guilty of treason: see the Law Commission (England), Working Paper No. 72, p. 29.

57. Official Secrets Act, R.S.C. 1970, c. 0-3, s. 13.

58. See s. 6(2), government employees committing offences outside Canada; s. 58(1), uttering a forged passport; and s. 59, fraudulent use of a certificate of citizenship. Presumably, s. 428 of the Code establishes "venue" in any court in Canada where the accused is found, thereby overcoming the point raised by Glanville Williams in "Venue and the Ambit of the Criminal Law," (1965) 81 L.Q.R. 276, 395, 518.

59. S. 52.

60. S. 53.

61. See Martin's Criminal Code, 1955, p. 128 where it is suggested that the present s. 376(2)(b) is comparable. But s. 376, which deals with selling defective merchandise to the government, only requires directors, officers, agents, or employees of a corporation that has or is about to breach this section to inform the government. S. 50(1) is unique in that it applies to everyone.

62. S. 50(1)(b).

63. The Law Commission (England), Working Paper No. 72, pp. 26-7.

64. See The Law Commission (England), Working Paper No. 72, p. 27. In *Sykes* v. *D.P.P.* [1962] A.C. 528 the House of Lords held that the ancient offence of misprision of felony still existed (now abolished by statute) but left open the question whether it would be an offence not to report a contemplated felony.

65. The Law Commission (England), Working Paper No. 72, p. 40.

66. See Glanville Williams, Criminal Law: The General Part, 2nd ed. (London, 1961) p. 615; Smith and Hogan, Criminal Law, 4th ed. (London, 1978), p. 262.

67. *R.* v. *Bleiler,* (1917) 11 W.W.R. 1459 at 1461 *per* Harvey C.J.A. *Cf. R.* v. *Snider* (1915) 34 O.L.R. 318 at 323 *per* Meredith, C.J.O.

68. S. 46(2)(b).

69. S. 421.

70. The Law Commission (England), Working Paper No. 72, p. 19.

71. S. 46(4) specifically provides that conspiracy is a sufficient overt act.

72. See I. D. Thornley, "Treason By Words in the Fifteenth Century", (1917) 32 English Historical Review 556; G. P. Fletcher, Rethinking Criminal Law (Toronto, 1978) at pp. 208-13; The Law Commission (England), Working Paper No. 72, p. 19; Kenny's Outlines of Criminal Law, 19th ed., (Cambridge, 1966) p. 397.

73. S. 48(2).

74. S. 47(3).

75. See Plucknett, A Concise History of the Common Law, 5th ed. (London, 1956) p. 444.

76. United States Constitution, Art. III, s. 3.

77. S. 48(1).

78. The Law Commission (England), Working Paper No. 72, p. 25.

79. S. 48(2).

80. 54 Geo. III, c. 146.

81. Stat. Upper Can. 1833, c. 3, s. 19.

82. *R.* v. *Maclane* (1797) 26 State Trials 721 at 826.

83. Proposed s. 46(e). See Senate, Debates 1952-53, p. 163.

84. The Treachery Act, Stat. Can. 1940, c. 43. See also The Law Commission (England), Working Paper No. 72, pp. 29-30 where the U.K. Treachery Act 1940 is discussed.

85. See Parrish, "Cold War Justice: The Supreme Court and the Rosenbergs" (1977) 82 Am. Hist. Rev. 805.

86. Indeed, even in wartime in England it would not apparently cover the activities of those who were in England clandestinely: see The Law Commission (England), Working Paper No. 72, p. 29.

87. See the remarks of the Minister of Justice, Stuart Garson, House of Commons, Debates 1953-54, vol. 4, p. 3666.

88. *R.* v. *Blake* (1961) 45 Criminal Appeal Reports 292 (C.C.A.). He received three sentences of 14 years to be served consecutively for a total of 42 years.

89. See House of Commons, Debates, 1952-53, vol. 2, pp. 1272-75 for the history of the section.

90. House of Commons, Debates, 1953-54, vol. 4, p. 3667.

91. House of Commons, Debates, 1953-54, vol. 4, p. 3668.

92. S. 47(2)(b) & (c) of the 1953-54 Code. The House added a curious limitation in s. 46(1)(h) (now 46(2)(e)) not found in any of the other treason categories whereby conspiracy to breach s. 46(1)(e) (now 46(2)(b)) requires a further overt act.

93. Actual "wartime", not "hostilities" as in s. 46(c).

94. Bellamy, The Law of Treason in England in the Later Middle Ages, p. 134.

95. Bellamy, The Law of Treason in England in the Later Middle Ages, p. 32. For other late medieval treason cases involving spying see pp. 16, 130.

96. Bellamy, The Law of Treason in England in the Later Middle Ages, p. 52.

97. See *R.* v. *De la Motte* (1781) 21 State Trials 687; Stephen, A History of the Criminal Law of England, vol. 2, p. 282.

98. *R.* v. *Maclane* (1797) 26 State Trials 721 at 749.

99. Including, perhaps, 'wilful blindness".

100. See The Law Commission, Working Paper No. 72, pp. 15-18; *R.* v. *Ahlers* [1915] 1 K.B. 616 (C.C.A.); Martin's Criminal Code, 1955, pp. 122-4; Leigh, "Law Reform and the Law of Treason and Sedition," [1977] Public Law 128 at pp. 134-35.

101. Official Secrets Act, R.S.C. 1970, c. 0-3, s. 3. See *infra.*

102. Report of the Royal Commission on Security (Abridged) (June, 1969) at p. 78.

103. C. N-4.

104. S. 55(1)(h). See also s. 55(7).

105. S. 57.

106. S. 2.

107. S. 74(f) of 1927 Criminal Code.

108. The Law Commission (England), Working Paper No. 72, p. 12.

109. The Law Commission (England), Working Paper No. 72, p. 37. *Cf.* Leigh "Law Reform and the Law of Treason and Sedition," [1977] Public Law 128 at pp. 135-6.

110. Final Report of the National Commission on Reform of Federal Criminal Laws (Proposed New Federal Criminal Code), § 1101. See also Working Papers of the National Commission on Reform of Federal Criminal Laws, (1970) vol. 1, pp. 419-30.

111. § 1103. See also Working Paper, vol. 1, pp. 430-35.

112. See generally P. W. Hogg, Constitutional Law of Canada (Toronto, 1977) pp. 50-4, especially at p. 50: "the absence of any provisions in the B.N.A. Act authorizing secession makes clear that no unilateral secession is possible." See also Claydon and Whyte, "Legal Aspects of Quebec's Claim for Independence" in R. Simeon, ed., Must Canada Fail? (Montreal, 1977) at p. 259; Greenwood, "The Legal Secession of Quebec — A Review Note" (1978) 12 U.B.C. L. Rev. 71; Matas, "Can Quebec Separate?" (1975) 21 McGill L.J. 387; Mayer, "Legal Aspects of Secession" (1968) 3 Man. L.J. 61. These references are discussed in a helpful paper prepared for the Commission by Mark Raines, "Legality of Quebec Secession: Some Recent Writings" December, 1978.

113. § 1102.

114. See A. C. Bundu, "Recognition of Revolutionary Authorities: Law and Practice of States" (1978) 27 Int. and Comp. L.Q. 18. See also L. C. Buchheit, Secession: The Legitimacy of Self-Determination (New Haven, 1978).

115. Lincoln gave pardons to the "rebels" in exchange for an oath of loyalty. See Surveillance and Espionage in a Free Society: A Report by the Planning Group on Intelligence and Security to the Policy Council of the Democratic National Committee (New York, 1972), p. 11.

116. 11 Henry VII, c. 1. See A. M. Honoré, "Allegiance and the Usurper", [1967] Cambridge Law Journal 214.

117. Maitland, The Constitutional History of England (Cambridge, 1908), p. 229.

118. *R.* v. *Twenty-nine Regicides* (1660) 5 State Trials 947.

119. L. H. Leigh, "Law Reform and the Law of Treason and Sedition", [1977] Public Law 128 at p. 144.

II. SEDITION (notes to page 17 of text)

1. Stephen, A History of the Criminal Law of England, (1883), vol. 2, p. 298. See also the Law Commission (England), Working Paper No. 72, Second Programme, Item XVIII, Codification of the Criminal Law, Treason, Sedition and Allied Offences, (London, 1977), p. 41.

2. Stephen, A History of the Criminal Law of England, vol. 2, p. 299.

3. The definition is set out on p. 136 of Martin's Criminal Code, 1955. For the definition as it appeared in Stephen's Digest and the English Draft Code see Stephen, A History of the Criminal Law of England, vol. 2, pp. 298-9.

4. House of Commons, Debates, 1892, vol. 2, col. 2837, cited in Martin's Criminal Code, 1955, p. 136.

5. House of Commons, Debates, 1892, vol. 2, col. 4344, cited in Martin's Criminal Code, 1955, p. 136.

6. *Boucher* v. *The King* [1951] S.C.R. 265 at 294.

7. The six are *R.* v. *Felton* (1915) 9 W.W.R. 819 (Alta. C.A.); *R.* v. *Cohen* (1916) 10 W.W.R. 333 (Alta. C.A.); *R.* v. *Manshrick* (1916) 27 C.C.C. 17 (Man. C.A.); *R.* v. *Trainor* [1917] 1 W.W.R. 415 (Alta. C.A.); *R.* v. *Geisinger* [1917] 1 W.W.R. 595 (Sask. C.A.); *R.* v. *Barron* [1919] 1 W.W.R. 262 (Sask. C.A.). See D. A. Schmeiser, Civil Liberties in Canada, (Toronto, 1964), p. 206. See also P. R. Lederman, "Sedition in Winnipeg: An Examination of the Trials for Seditious Conspiracy Arising from the General Strike of 1919," (1976-77) 3 Queen's Law Journal 3 at pp. 18-20.

8. *R.* v. *Cohen* (1916) 10 W.W.R. 333.

9. *R.* v. *Barron* [1919] 1 W.W.R. 262.

10. *R.* v. *Trainor* [1917] 1 W.W.R. 415 at 423.

11. Lederman, "Sedition in Winnipeg," at pp. 20-21.

12. For the American experience see R. K. Murray, Red Scare: A Study in National Hysteria, 1919-20 (Minneapolis, 1955).

13. Stat. Can. 1919, c. 46, s. 5.

14. Stat. Can. 1930, c. 11, s. 3.

15. Stat. Can. 1951, c. 47, s. 9.

16. Stat. Can. 1953-54, c. 51, s. 62.

17. *R.* v. *Russell* (1920) 51 D.L.R. 1 (Man. C.A.) at 12. There were later prosecutions against F. J. Dixon and J. S. Woodsworth (after whom Woodsworth College at U. of T. is named) for continuing to publish the strikers' newsletter; Dixon was acquitted and a *nolle prosequi* was entered against Woodsworth. See K. McNaught, "Political Trials and the Canadian Political Tradition," in Friedland (ed.), Courts and Trials: A Multidisciplinary Approach (Toronto, 1975), 137, at p. 150, n. 34.

18. See McNaught at p. 150, n. 34. See also McNaught and Bercuson, The Winnipeg Strike: 1919 (Toronto, 1974); Masters, The Winnipeg General Strike (Toronto, 1950); Lederman, "Sedition in Winnipeg," (1976-7) 3 Queen's Law Journal 3; MacKinnon, "Conspiracy and Sedition as Canadian Political Crimes," (1977) 23 McGill Law Journal 622.

19. Against: McNaught, "Political Trials," pp. 149-50; MacKinnon, "Conspiracy and Sedition," p. 628. For: Lederman, "Sedition in Winnipeg," pp. 17-22; Crankshaw in an annotation to the case in (1920) 33 C.C.C. at p. 37 went even further and said that "The prosecution's evidence . . . seems to go further than proof of a seditious conspiracy. It is evidence of or approaching to proof of the crime of treason."

20. *R.* v. *McLachlan* (1924) 41 C.C.C. 249 (N.S.).

21. *Brodie* v. *The King* [1936] S.C.R. 188; *Duval* v. *The King* (1938) 64 Quebec K.B. 270 (C.A.). See generally Penton, The Jehovah's Witnesses in Canada, (Toronto, 1976).

22. The Law Commission (England), Working Paper No. 72, p. 43.

23. *Boucher* v. *The King* [1950] 1 D.L.R. 657 at pp. 672-3 (first hearing).

24. *Boucher* v. *The King* [1951] S.C.R. 265 at 301 *per* Kellock J. It was this quote that formed the basis of the S.C.R. headnote. The dissenting members of the court would have ordered a new trial. This was a re-hearing of an earlier decision before a five man court which had decided (3-2) that a new trial should be ordered.

25. *Boucher* v. *The King* [1951] S.C.R. 265 at 288.

26. The case is not reported: see MacKinnon, "Conspiracy and Sedition," pp. 634-36, and McNaught, "Political Trials and the Canadian Political Tradition," pp. 151-5.

27. MacKinnon, "Conspiracy and Sedition," p. 636.

28. The Law Commission (England), Working Paper No. 72, p. 46.

29. Histories of sedition can be found in Stephen, A History of the Criminal Law of England, vol. 2, pp. 298-380; M. R. MacGuigan, "Seditious Libel and Related Offences in England, the United States, and Canada," appendix I to The Report of the Special Committee on Hate Propaganda in Canada (Ottawa, 1966); and W. E. Conklin, "The Origins of the Law of Sedition," (1972-3) 15 Criminal Law Quarterly 277. See also E. Campbell and H. Whitmore, Freedom in Australia (Sydney, 1973) at pp. 324 *et seq.*

30. See Lewis and Short, A Latin Dictionary (Oxford, 1879), p. 1660.

31. Bellamy, The Law of Treason in England in the Later Middle Ages, pp. 116-17.

32. Words were enough in the time of Henry VI; for example, *Jack Cade's* case in 1453: see Bellamy, The Law of Treason in England in the Later Middle Ages, p. 124. See also I. D. Thornley, "Treason by Words in the Fifteenth Century," (1917) 32 English Historical Review 556. For a discussion of treason by words in the 16th and 17th centuries see Holdsworth, A History of English Law, vol. 4 at pp. 492 *et seq.* and vol. 8 at p. 313.

33. Plucknett, A Concise History of the Common Law, p. 177; W. G. Simon, "The Evolution of Treason," (1961) 35 Tulane Law Review 669 at p. 694.

34. See Stephen, A History of the Criminal Law of England, vol. 2, p. 302; E. G. Hudon, Freedom of Speech and Press in America (Washington, 1963), p. 9; Holdsworth, History of English Law, vol. 5, p. 208.

35. Holdsworth, History of English Law, vol. 5, p. 208.

36. *De Libellis Famosis* (of scandalous libels) (1606) 5 Co. Rep.125a, 77 E.R. 250. There continued to be doubts about whether words alone could constitute treason: Peacham in 1615 was convicted of treason for a sermon that was not preached (7 State Trials 869), but as the State Trial report states, "many of the Judges were of the opinion that it was not Treason." Clearly in Canada today words alone can amount to treason if "expressed or declared by open and considered speech": s. 48(2) of the Criminal Code.

37. Coke, Third Institutes (1644), p. 14.

38. See generally, Plucknett, A Concise History of the Common Law, pp. 485-9. The offence was created in 1275 by statute (3 Edward I, c. 34) and was added to over the years (2 Richard II, c. 5; 12 Richard II, c. 11; 1 & 2 Philip and Mary, c. 3 which added the word "seditious").

39. 5 Co. Rep. 125a, 77 E.R. 250.

40. Conklin, "The Origins of the Law of Sedition," pp. 285-86; MacGuigan, "Seditious Libel and Related Offences in England, the United States, and Canada," pp. 79-80; Stephen, A History of the Criminal Law of England, vol. 2, pp. 302-4.

41. See generally, Holdsworth, History of English Law, vol. 5, pp. 208 *et seq.*

42. Cited in Stephen, A History of the Criminal Law of England, vol. 2, p. 318.

43. 21 State Trials, 953 (otherwise known as the *Dean of St. Asaph's case*). See Stephen, A History of the Criminal Law of England, vol. 2, pp. 330-43. See also Lord Kenyan's summing up in 1792 in the Thomas Paine, Rights of Man case (22 State Trials 1017; Stephen, A History of the Criminal Law of England, vol. 2, p. 366).

44. It will be recalled that although Erskine lost the *Shipley* case the principle he was espousing was embodied in Fox's Libel Act of 1792. See Stephen, A History of the Criminal Law of England, vol. 2, pp. 301, 343-47. Fox's Libel Act is incorporated in the Criminal Code as section 281.

45. This included respect for foreign rulers. A charge was successfully brought against a person who insulted Napoleon in 1803, but war broke out before he was sentenced: *R.* v. *Peltier,* 28 State Trials 530. This was still an offence in Canada until the 1953-54 revision of the Criminal Code: see s. 135 of the 1927 Code.

46. See generally, Stephen, A History of the Criminal Law of England, vol. 2, pp. 299-301: Lederman, "Sedition in Winnipeg," pp. 6-7. The point is also made in the *Boucher* case by Rand and Kellock JJ.: [1951] S.C.R. 265 at 285 and 294.

47. W. Ivor Jennings, The Sedition Bill Explained (London, 1934), p. 12, cited in Bunyan, The History and Practice of the Political Police in Britain (London, 1977) at p. 28. See also Thomis and Holt, Threats of Revolution in Britain, 1789-1848 (1977).

48. Stephen, A History of the Criminal Law of England, vol. 2, pp. 301 and 373: Plucknett, A Concise History of the Common Law, p. 501; and Spencer, "Criminal Libel — A Skeleton in the Cupboard," [1977] Crim. L.R. 383 at pp. 384-387.

49. Another branch of libel is blasphemous libel (see s. 260 of the Code), the subject of a recent prosecution in England: see *Regina* v. *Lemon* [1979] 2 W.L.R. 281 (H.L.).

50. S. 275. See also s. 273 which provides that no person shall be deemed to publish a defamatory libel if he, on reasonable grounds, believes that what he published was true and if it is relevant to a subject, the discussion of which is for the public benefit.

51. See generally Spencer, "Criminal Libel — A Skeleton in the Cupboard", [1977] Crim. L.R. 383 and 465.

52. *Cf.* Spencer at p. 474.

53. Stephen, A History of the Criminal Law of England, vol. 2, pp. 299-300; Lederman, "Sedition in Winnipeg," pp. 6-7.

54. Lederman, "Sedition in Winnipeg," pp. 8-9. The provision is now s. 61, Criminal Code.

55. See *The Poulterers' Case* (1610) 9 Co. Rep. 55b, 77 E.R. 813; MacKinnon, "Conspiracy and Sedition as Canadian Political Crimes," pp. 637-8; Holdsworth, History of English Law, vol. 5, pp. 204-5.

56. 32 Geo. III, c. 60. See the Canadian Criminal Code s. 281.

57. *The Case of Redhead Yorke,* (1795) 25 State Trials 1003. See Stephen, A History of the Criminal Law of England, vol. 2, pp. 377-8.

58. (1795) 36 Geo. III, c. 7 & 8. See Stephen, A History of the Criminal Law of England, vol. 2, p. 378; Holdsworth, History of English Law, vol. 13, p. 156 *et seq.,* D. Williams, Keeping the Peace (London, 1967), p. 179.

59. See E. G. Hudon, Freedom of Speech and Press in America (Washington 1963), pp. 44 *et seq.;* D. B. Davis, "Internal Security in Historical Perspective: From the Revolution to World War II" in Surveillance and Espionage in a Free Society, ed. R. H. Blum (Washington, 1972) at p. 5 *et seq.* There was a strong reaction against the Acts so that it was not until 1918 that Congress again tried to define and punish sedition (p. 9).

60. See Hudon at p. 44.

61. Stephen, A History of the Criminal Law of England, vol. 2, p. 378.

62. *Id.*

63. R. v. *Russell* (1920) 51 D.L.R. 1 (Man. C.A.);
Brodie v. *The King* [1936] S.C.R. 188;
Duval v. *The King* (1938) 64 Quebec K.B. 270.

64. 1797 and 1799 respectively (37 Geo. III, c. 123 and 39 Geo. III, c. 79). See Stephen, A History of the Criminal Law of England, vol. 2, p. 294.

65. Cited in Stephen, A History of the Criminal Law of England, vol. 2, pp. 294-5.

66. Ss. 130-132 of the 1927 Criminal Code. And see the reference to the Seditious Associations Act C.S.L.C. 1860, c. 10, in Martin's Criminal Code, 1955 at p. 148.

67. It was so numbered in the 1927 Code, but it was actually introduced in 1919 as ss. 97A & B of the Code.

68. S. 98(3).

69. S. 98(1).

70. S. 98(4).

71. S. 98(6).

72. *R.* v. *Seto Kin Kui* [1919] 3 W.W.R. 318 (B.C.S.C.). See generally, Mackenzie, "Section 98, Criminal Code and Freedom of Expression in Canada" (1972) 1 Queen's Law Journal 469.

73. R. Haggart & A. E. Golden, Rumours of War, (Toronto 1971), pp. 138-39.

74. Final Report of C. H. Cahan, Public Archives of Canada, Borden Papers, vol. 104, September 14, 1918. The report is discussed by Mackenzie, "Section 98, Criminal Code and Freedom of Expression in Canada," p. 471.

75. House of Commons, Debates, 1919, p. 1956.

76. For the chronology of events see Mackenzie, "Section 98, Criminal Code and Freedom of Expression in Canada," pp. 473-75, and Lederman, "Sedition in Winnipeg," pp. 11-12.

77. McNaught, "Political Trials and the Canadian Political Tradition," p. 151 says yes; Mackenzie, "Section 98, Criminal Code and Freedom of Expression in Canada" pp. 470-75 suggests that the section *probably* would have been enacted anyway; and Lederman, "Sedition in Winnipeg" p. 12 states that it "would *undoubtedly* have been introduced even if the strike had never taken place" (my italics).

78. House of Commons, Debates, 1919, p. 3285.

79. See R. K. Murray, Red Scare: A Study in National Hysteria, 1919-20 (Minneapolis, 1955).

80. McNaught, "Political Trials and the Canadian Political Tradition," p. 147.

81. See D. J. Bercuson, Confrontation at Winnipeg (Montreal, 1974) at p. 154.

82. Mackenzie, "Section 98, Criminal Code and Freedom of Expression in Canada," p. 474.

83. Haggart and Golden, Rumours of War, pp. 135-36, 144, 146; F. A. Kunz, The Modern Senate in Canada, (Toronto, 1965), p. 283.

84. Now s. 60(4).

85. *Boucher* v. *The King* [1951] S.C.R. 265.

86. *Switzman* v. *Elbling and A.-G. of Quebec* [1957] S.C.R. 285.

87. *R.* v. *Weir* (1929) 52 C.C.C. 111 (Ont. Cty. Ct.); *R.* v. *Buck* (1932) 57 C.C.C. 290 (Ont. C.A.); *R.* v. *Evans* (1934) 62 C.C.C. 29 (B.C.C.A.). See D. A. Schmeiser, Civil Liberties in Canada (Toronto, 1964), p. 218.

88. *R.* v. *Buck* (1932) 57 C.C.C. 290 at p. 292. See also McNaught, "Political Trials and the Canadian Political Tradition", p. 51; Mackenzie, "Section 98, Criminal Code and Freedom of Expression in Canada," p. 476; Haggart and Golden, Rumours of War, p. 144.

89. See M. J. Penton, Jehovah's Witnesses in Canada (Toronto, 1976), pp. 129-155; Haggart & Golden, Rumours of War, p. 147.

90. Public Order Regulations, 1970 SOR/70-444, proclaimed October 16, 1970. A copy of them is to be found in an appendix to Haggart and Golden, Rumours of War, pp. 281-6.

91. Public Order Regulations, (1970), s. 3.

92. Stat. Can. 1970, c. 2, s. 3.

93. See Friedland, "Trial under the War Measures Act: Can Crime be Retroactive?", Globe and Mail, October 28, 1970.

94. The Prevention of Terrorism (Temporary Provisions) Act 1976, ss. 1, 2 and Schedule 1.

95. 54 Stat. 670 (1940), now 18 U.S.C. § 2385 - 2386.

96. For a full discussion of the Act see M. R. Belknap, Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties (Westport, Conn., 1977).

97. *Dennis* v. *U.S.* (1951) 341 U.S. 494.

98. From *Schenck* v. *U.S.* (1919) 249 U.S. 47 at 52: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." The *Schenck* case had upheld the 1918 Sedition Act.

99. *Dennis* v. *U.S.* (1951) 341 U.S. 494 at 509.

100. *Yates* v. *U.S.* (1957) 354 U.S. 298.

101. *Yates* v. *U.S.* (1957) 354 U.S. 298 at 325.

102. *Noto* v. *U.S.* (1961) 367 U.S. 290 at 298.

103. Belknap, Cold War Political Justice, p. 270.

104. Belknap, Cold War Political Justice, p. 282. See also *Brandenburg* v. *Ohio* (1969) 395 U.S. 444 and the comment on the case, (1975) 43 University of Chicago Law Review 151.

105. Final Report of the National Commission on Reform of the Federal Criminal Laws, (Proposed New Federal Criminal Code), (Title 18, U.S.C.) (Washington, 1971), comment to § 1103, p. 80. See also Working Papers of the National Commission on Reform of Federal Criminal Laws (July, 1970), vol. 1, pp. 430-35; Final Report of the Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities (the Church Report) (Washington, 1976), Book II, at p. 339.

106. *Boucher* v. *The King* [1951] S.C.R. 265.

107. [1951] S.C.R. 265 at 301 *per* Kellock, J.

108. The Law Commission (England), Working Paper No. 72, p. 47.

109. The Law Commission (England), Working Paper No. 72, p. 48. See also Leigh, "Law Reform and the Law of Treason and Sedition," p. 147.

110. See Final Report of the National Commission on Reform of Federal Criminal Laws (Proposed New Federal Criminal Code), § 1103 (3).

III. OTHER CRIMINAL OFFENCES (notes to page 26 of text)

1. Criminal Code, s. 52. The word sabotage derives from "sabot", the French word for the wooden shoes that French workers threw into the machinery in protest against industrialization.

2. Stat. Can. 1951, c. 47, s. 18.

3. See ss. (3) & (4).

4. See also the Final Report of the National Commission on Reform of Federal Criminal Laws (Proposed New Federal Criminal Code), § 1105 - 1107, which distinguishes, *inter alia,* between wartime and peacetime (but treats catastrophic sabotage relating to such things as missiles and nuclear weaponry as comparable to the former category) and between intentionally and recklessly impairing military effectiveness. See Working Papers of the National Commission on Reform of Federal Criminal Laws, vol. 1, pp. 439-45.

5. *Chandler and others* v. *D.P.P.* [1964] A.C. 763.

6. See generally D. Williams, Keeping the Peace (London, 1967); I. Brownlie, The Law Relating to Public Order, (London, 1968); and Smith and Hogan, Criminal Law, 4th ed. (London, 1978),

pp. 750-62. Wade and Phillips, Constitutional and Administrative Law (9th ed., 1977, A. W. Bradley ed.) at pp. 488 *et seq.;* E. Campbell and H. Whitmore, Freedom in Australia (Sydney, 1973) at pp. 158 *et seq.* For a discussion of techniques of control see Grunis, "Police Control of Demonstrations" (1978) 56 Can. B. Rev. 393.

7. Stat. Can. 1892, c. 29, s. 90.

8. Stat. Can. 1892, c. 29, s. 79.

9. Stat. Can. 1892, c. 29, s. 83. Since an unlawful assembly that has begun to disturb the peace tumultuously is a riot (s. 80), three people could be enough for a riot; this was expressly stated in An Act Respecting Riots, Unlawful Assemblies and Breaches of the Peace, R.S.C. 1886, c. 147, s. 13. Nevertheless, twelve were required before the sheriff could read the Riot Act (s. 83).

10. Brownlie, The Law Relating to Public Order, p. 55.

11. S. 160, now s. 171.

12. S. 64.

13. See Stephen, A History of the Criminal Law of England (London, 1883), vol. 2, pp. 385-7.

14. See Martin's Criminal Code, 1955, p. 142.

15. Brownlie, The Law Relating to Public Order, p. 39. See also D. Williams, Keeping the Peace, pp. 236 *et seq.*

16. S. 67.

17. Compare the *mens rea* requirement under the English common law offence in Smith and Hogan, Criminal Law, 4th ed., pp. 752-54.

18. D. Williams, Keeping the Peace, p. 31.

19. 13 Henry IV, c. 7; 3-4 Edward VI, c. 5; 1 Mary (2nd session), c. 12.

20. See Holdsworth, A History of English Law, vol. 8, pp. 327 *et seq.*

21. See generally, R. Quinault and J. Stevenson, Popular Protest and Public Order: Six Studies in British History 1790-1920 (London, 1974) for the development of this point. The book contains a history of some of the more important riots in British history. "In eighteenth-century England," writes J. Stevenson in his paper "Food Riots in England 1792-1818" at p. 33, "the most characteristic form of popular protest was riot, and riots occurred on a wide range of issues, including elections, religion, politics, recruiting, and enclosures. . . . The most persistent and widespread riots were those associated with food, for it has been calculated that two out of every three disturbances in the eighteenth century were of this type." See also G. Rudé, The Crowd in History, 1730-1848 (N.Y., 1964); E. P. Thompson, "The Moral Economy of the English Crowd in the 18th Century", Past and Present, no. 50, Feb. 1970, pp. 76-136; and C. Tilly, "European Violence in Historical Perspective" in H. D. Graham & T. R. Gurr (eds.), The History of Violence in America (Report to the National Commission on Violence, 1969), pp. 5-34.

22. S. 65.

23. S. 68.

24. K. McNaught, "Political Trials and the Canadian Political Tradition," in Courts and Trials ed. M. L. Friedland (Toronto, 1975) p. 148.

25. S. 69(b).

26. Final Report of the National Commission on Reform of Federal Criminal Laws (Proposed New Federal Criminal Code), § 1804 & 3001. S. 1 provided only a 5 day penalty: L. B. Schwartz, "Reform of the Federal Criminal Laws: Issues, Tactics and Prospects," [1977] Duke Law Review 171 at p. 209.

27. Schwartz, "Reform of the Federal Criminal Laws" p. 209. S. 1 proposed to give the power to any policeman or other public servant.

28. Schwartz, "Reform of the Federal Criminal Laws", p. 209, f.n.216. The Commission, however, did not exclude the Press from the section.

29. Criminal Law Act 1967. See Smith and Hogan, Criminal Law, 4th ed. p. 756. The ordinary police power to control crowds was thought sufficient, aided by the power to arrest under the Public Order Act 1936, s. 5, for "threatening, abusive and insulting behaviour." See Brownlie, The Law Relating to Public Order, p. 46.

30. It would be better to have a specific provision than to leave it to judicial determination under the obstructing a police officer section, where too many civil liberties issues are currently fought out. See C. C. Ruby, "Obstructing a Police Officer" (1972-73) 15 Criminal Law Quarterly 375.

31. See generally D. Williams, Keeping the Peace, 49-86; Brownlie, The Law Relating to Public Order, pp. 129-47; A. A. Borovoy, "Civil Liberties in the Imminent Hereafter", (1973) 51 Canadian Bar Review 93; L. Schwartz, "Reform of the Federal Criminal Laws", pp. 217-19.

32. *A. G. (Can.) and Dupond* v. *Montreal* [1978] 2 S.C.R. 770.

33. *Smith* v. *Collin* (1978) 99 S.Ct. 291. See A. Neier, Defending My Enemy: American Nazis, The Skokie Case, and the Risks of Freedom (New York, 1979).

34. Borovoy, "Civil Liberties in the Imminent Hereafter", p. 106.

35. S. 87. A section dealing with unlawful drilling was also included in the Riots and Unlawful Assemblies Act, R.S.C. 1886, c. 147, s. 4. In this Act, however, unauthorized drilling was made unlawful: there was no need for a special proclamation. The earliest Canadian Act dealing with unlawful drilling seems to have been passed in Upper Canada in 1838 following the Mackenzie Rebellion, 1 Vict. c. 11, s. 1.

36. See I. Brownlie, The Law Relating to Public Order (London, 1968), p. 93.

37. Final Report of the National Commission on Reform of Federal Criminal Laws (Proposed New Federal Criminal Code) § 1104. See also Working Papers of the National Commission on Reform of Federal Criminal Laws, vol. 1, pp. 436-39.

38. 18 U.S.C. § 2386.

39. See Friedland, "Gun Control: The Options" (1975) 18 Crim. L.Q. 29 at p. 59.

40. For the difficult problem of differentiating private armies from "groups which, in a particular local situation, have a need to organize for self-protection" see Working Papers of the National Commission on Reform of Federal Criminal Laws, vol. 1, p. 437.

41. S. 1. See Brownlie, The Law Relating to Public Order, pp. 94 *et seq.;* D. Williams, Keeping the Peace, pp. 216 *et seq.*

42. D. Williams, Keeping the Peace, pp. 216-17.

43. S. 2. See Brownlie, The Law Relating to Public Order, pp. 96-9; D. Williams, Keeping the Peace, p. 221.

44. S. 72 of the 1892 Code. See Martin's Criminal Code, 1955, p. 131.

45. The immediate cause of the legislation was the Royal Navy mutiny at Nore in 1797. The statute was made permanent in 1817, having lapsed in 1805. See The Law Commission, Working Paper No. 72, pp. 49-50.

46. The Law Commission (England), Working Paper No. 72, p. 49.

47. See Tony Bunyan, The History and Practice of the Political Police in Britain (London, 1977), p. 29.

48. D. Williams, Keeping the Peace, p. 185. They were also charged with conspiracy to publish seditious libels.

49. John Campbell, acting editor of Workers Weekly was charged under the Act on August 5, 1924. The charges were later dropped: see Edwards, The Law Officers of the Crown (London, 1964) p. 199 *et seq.;* D. Williams, Keeping the Peace, p. 185; Bunyan, The History and Practice of the Political Police in Britain, pp. 29-31.

50. The Law Commission (England), Working Paper No. 72, pp. 50-3.

51. See The Law Commission (England), Working Paper No. 72, pp. 50-3; D. Williams, Keeping the Peace, pp. 187-191 where he points out that the Act was also to provide a summary trial, but in the course of passage it was amended so that the accused still had the right to a jury. Comparable legislation was passed as regulations under the Emergency Powers Act of 1920: Williams, Keeping the Peace, p. 192.

52. D. Williams, Keeping the Peace, p. 187.

53. D. Williams, Keeping the Peace, pp. 188-9.

54. The Law Commission (England), Working Paper No. 72, p. 58.

55. Stat. Can. 1951, c. 47, s. 8.

56. See the Final Report of the National Commission on Reform of Federal Criminal Laws (Proposed New Federal Code) § 1110.

57. Proceedings of the Senate's Standing Committee on Banking and Commerce, Dec. 15 & 16, 1952, p. 56. See Martin's Criminal Code, 1955, p. 141.

58. The Law Commission (England), Working Paper No. 72, p. 55.

59. See Williams, Keeping the Peace, p. 11.

60. Bunyan, The History and Practice of the Political Police in Britain, p. 35.

IV. THE OFFICIAL SECRETS ACT (notes to pages 30-31 of text)

1. Report of the Royal Commission on Security (Abridged) (1969), p. 75.

2. Report of the Royal Commission on Security, p. 78.

3. The Report of the Royal Commission Appointed under Order in Council P.C. 411 of February 5, 1946 to investigate the Facts Relating to and the Circumstances Surrounding the Communication, By Public Officials and Other Persons in Positions of Trust of Secret and Confidential Information to Agents of a Foreign Power (Ottawa, 1946), p. 689, (hereafter referred to as The Taschereau-Kellock Report).

4. Stat. Can. 1950, c. 46. See House of Commons, Debates, 1950, vol. 4, p. 3996. There were also some very minor changes in the 1966-67 Canadian Forces Reorganization Act, Stat. Can. 1966-67, c. 96, Schedule B.

5. Stat. Can. 1973-74, c. 50, ss. 5 & 6.

6. Official Secrets Act, 1911, 1 & 2 Geo. 5, c. 28.

7. Official Secrets Act, 1920, 10 & 11 Geo. 5, c. 75. As an aside, it should be noted that the Canadian Official Secrets Act was used as a model by South Africa when it replaced the U.K. legislation in 1956.

8. The judgment of Trudel J. is appended to the House of Commons Debates of 9 June, 1978.

9. See the Globe and Mail, 18 March 1978, p. 1 and the announcement by Attorney-General Basford of the decision to prosecute (House of Commons, Debates, 17 March 1978).

10. Report of the Departmental Committee on Section 2 of the Official Secrets Act 1911, Cmnd. 5104 (London, 1972), hereafter cited as The Franks Report.

11. Reform of Section 2 of the Official Secrets Act 1911, Cmnd. 7285, July, 1978. A Summary of the White Paper can be found in The Times, Thursday, July 20, 1978, p. 4.

12. Official Secrets Act, 1889, 52 & 53 Vict., c. 52.

13. Official Secrets Act, 1890, Stat. Can. 1890, c. 10. The Act was passed at the request of the U.K. (House of Commons, Debates, 1890, col. 3203). It is curious that the title of the Act is "An Act to prevent the Disclosure of Official Documents and Information" and does not use the word

secret, nor does the body of the Act, except for s. 2(2) which mentions contracts involving an "obligation of secrecy", yet the short title specified in s. 7 is, like the U.K. Act, "The Official Secrets Act". The 1889 U.K. Act had applied to "all acts . . . committed in any part of Her Majesty's dominions" and offences under the Act could be tried in England or Canada (s. 6). S. 5 of the U.K. Act stated that the Act would be suspended by the U.K. government if provisions are passed by the legislature of any British possession "which appear to Her Majesty the Queen to be of the like effect as those contained in this Act."

14. Stat. Can. 1892, c. 29, ss. 76-8.

15. See generally, for descriptions of the background to the Act, D. Williams, Not in the Public Interest: The Problem of Security in Democracy, (London, 1965), pp. 15-20: J. Aitken, Officially Secret (London, 1971), pp. 7-14; T. Bunyan, The History and Practice of the Political Police in Britain (London, 1977), pp. 5-6; The Franks Report, Appendix III.

16. See J. Aitken, Officially Secret, pp. 7-14.

17. The Franks Report, p. 121.

18. House of Commons (England), Debates, 1887, vol. 3, col. 20.

19. House of Commons (England), Debates, 1887, vol. 4, col. 488.

20. The Franks Report, p. 121.

21. House of Commons (England), Debates, 1889, cited in Bunyan at p. 6.

22. D. Williams, Not in the Public Interest, pp. 23-4; T. Bunyan, The History and Practice of the Political Police in Britain, pp. 7-8.

23. Official Secrets Act 1889, s. 1(3). See J. Aitken, Officially Secret, p. 17, citing the 1892 *Holden* case.

24. The Franks Report, pp. 24 & 122.

25. J. Aitken, Officially Secret, p. 19.

26. House of Commons (England), Debates, 1911, vol. 29, cols. 2122 & 2257. See also the Franks Report, pp. 24-25; T. Bunyan, The History and Practice of the Political Police in Britain, pp. 8-9; and the memoirs of J. E. B. Seely, Under-Secretary of State for War, Adventure (London, 1930), p. 145. A lengthy quotation from the memoirs is included in D. Williams, "Official Secrecy and the Courts" in Reshaping the Criminal Law (P. R. Glazebrook, ed., London, 1978) 154 at p. 160.

27. *R.* v. *Parrott* (1913) 8 Cr. App. R. 186. See also D. Williams, Not in the Public Interest, pp. 31-2.

28. The Franks Report, p. 23.

29. The Franks Report, pp. 24-25, 122.

30. Stat. Can. 1912, p. V.

31. See T. Bunyan, The History and Practice of the Political Police in Britain, p. 10. "Many observers" writes Iain McLean in "Red Clydeside, 1915-1919" in R. Quinault and J. Stevenson, "Popular Protest and Public Order" (London, 1974) "both at the time and later, thought that 1919 marked the high point for the prospects of the British revolution."

32. See J. Aitken, Officially Secret, p. 24.

33. House of Commons (England), Debates, 1920, vol. 11, col. 1566.

34. House of Commons (England), Debates, 1920, vol. 12, col. 969.

35. Stat. Can. 1939, c. 49.

36. House of Commons, Debates, 1939, vol. 4, p. 2705.

37. *R.* v. *Smith* (1947) 89 C.C.C. 8 (Ont. C.A.). See also The Report of the Royal Commission on Security, p. 77 (paras. 208 & 211).

38. Stat. Can. 1950, c. 46; Stat. Can. 1966-67, c. 96, Schedule B.

39. E.g., the word "gotten", which had been in s. 2(*i*)(ii), was replaced with the word "obtained". The word "gotten" had been introduced in the 1920 English Act in Schedule I.

40. Stat. Can. 1973, c. 50, ss. 5 and 6.

41. D. Williams, Not in the Public Interest (1965) chapter 4; Wade and Phillips, Constitutional and Administrative Law (9th ed., 1977, A. W. Bradley, ed.) at p. 527.

42. Campbell and Whitmore, Freedom in Australia (Sydney, 1973) at p. 331 *et seq.*

43. At p. 527.

44. See the Taschereau-Kellock Report and Nora and William Kelly, The Royal Canadian Mounted Police: A Century of History 1873-1973 (Edmonton, 1973), pp. 203-12. The Canadian prosecutions for breaches of the Official Secrets Act or for conspiracy to breach the Act are:

(1) *R.* v. *Rose* [1947] 3 D.L.R. 618 (Que. C.A.), convicted, 6 years.
(2) *R.* v. *Lunan* [1947] 3 D.L.R. 710 (Ont. C.A.), convicted.
(3) *R.* v. *Smith* [1947] 3 D.L.R. 798 (Ont. C.A.), convicted.
(4) *R.* v. *Mazerall* [1946] O.R. 511 (High Ct.), 762 (C.A.), convicted.
(5) *R.* v. *Willsher* (c. 1946) unreported, convicted.
(6) *R.* v. *Gerson* [1948] 3 D.L.R. 280 (Ont. C.A.), conviction quashed on appeal.
(7) *R.* v. *Woikin* (1946) 1 C.R. 224, convicted, 2 1/2 years.
(8) *R.* v. *Boyer* (1948) 7 C.R. 165 (Que. C.A.) convicted.
(9) *R.* v. *Carr* (1949) unreported, convicted, 6 years.
(10) *R.* v. *Adams* (c. 1946) unreported, but see (1946) 86 C.C.C. 425 (on application for change of venue), acquitted.
(11) *R.* v. *Nightingale* (c. 1946) unreported, but see (1946) 87 C.C.C. 143 (a contempt of court conviction upheld on appeal), acquitted.
(12) *R.* v. *Shugar* (c. 1946) unreported, acquitted.
(13) *R.* v. *Chapman* (c. 1946) unreported, acquitted.
(14) *R.* v. *Poland* (c. 1946) unreported, acquitted.
(15) *R.* v. *Halperin* (c. 1946) unreported, acquitted.
(16) *R.* v. *Benning* [1947] 3 D.L.R. 908 (Ont. C.A.), conviction quashed on appeal.
(17) *R.* v. *Harris* [1947] 4 D.L.R. 796 (Ont. C.A.), conviction reversed on appeal.
(18) *R.* v. *Biernacki* (1961) unreported, but see (1962) 37 C.R. 226 (motion to quash a preferred indictment), charge dismissed at preliminary inquiry.
(19) *R.* v. *Featherstone* (1967) unreported, convicted, 2 1/2 years.
(20) *R.* v. *Treu* (1978) convicted, 2 years; reversed on appeal; not yet reported.
(21) *R.* v. *Toronto Sun Publishing Ltd., Creighton and Worthington* (1979) dismissed at preliminary inquiry.

Related cases include:

(1) *R.* v. *Pochon; R.* v. *French* (1946) 87 C.C.C. 38 (Ont. High Ct.).
(2) *R.* v. *Bronny* (1940) 74 C.C.C. 154 (B.C.C.A.) (under s. 16 of Def. of Can. Regs.).
(3) *R.* v. *Jones* (1942) 77 C.C.C. 187 (N.S.C.A.) (under s. 16 of Def. of Can. Regs.).
(4) *R.* v. *Samson* (1977) 35 C.C.C. (2d) 258 (Que. C.A.).

45. *R.* v. *Mazerall.*

46. *R.* v. *Woikin.*

47. Rose, Mazerall, Lunan, Harris, Smith, Boyer, Gerson. As will be seen later, if the charge is conspiracy to breach the Act the presumption sections of the Act cannot be used.

48. House of Commons, Debates, June 9, 1978, pp. 6243-6251.

49. Judgment no. 5626, (1961) Court of Preliminary Inquiry, District of Montreal. See also (1962) 37 C.R. 226.

50. Judgment no. 5626, Court of Preliminary Inquiry, District of Montreal, p. 52.

51. See Nora and William Kelly, A History of the Royal Canadian Mounted Police, pp. 288-89. The case is not reported but the Kellys' statement that the charge used the words "purpose prejudicial to the safety of the state" and named the U.S.S.R. as a possible beneficiary indicates that it must have been under s. 3, likely s. 3(1)(c). They also mention a charge for retaining the documents. This would likely be under s. 4(1)(c).

52. Appendix to the House of Commons, Debates, June 9, 1978. At the time of writing only the French text is available. The Official English translation was to be inserted in Hansard when available.

53. House of Commons, Debates, June 9, 1978, p. 6238.

54. The Globe and Mail, May 6, 1978.

55. The Globe and Mail, July 5, 1978.

56. *Treu* v. *The Queen,* 20 Feb. 1979, as yet unreported.

57. *Per* Kaufman, J. A. at p. 3.

58. *The Queen* v. *Toronto Sun Publishing Ltd., Creighton and Worthington,* 23 April 1979, as yet unreported.

59. At p. 21.

60. At p. 23.

61. Wiretaps under s. 16 of the Official Secrets Act will be dealt with in a later section.

62. See Worthington's column in the Toronto *Sun,* March 9, 1978.

63. See, for example, The Taschereau-Kellock Report, p. 680.

64. See M. Cohen, "Espionage and Immunity — Some Recent Problems and Developments" (1948) 25 British Yearbook of International Law 404.

65. House of Commons, Debates, 1978, pp. 2697-98.

66. See the Report of the Commission of Inquiry into Complaints Made by George Victor Spencer (Ottawa, 1966).

67. Peter C. Newman, The Distemper of Our Times (Toronto, 1968) p. 391.

68. The Franks Report, Appendix II.

69. In addition there was the *Chandler* case, [1964] A.C. 763, discussed in the next section.

70. For a discussion of these and other British spy cases of the post-war era see Rebecca West, The New Meaning of Treason (New York, 1964).

71. The Times, 31 October 1978. See the paper prepared for the Commission by David Williams, "The ABC Case 1977-78."

72. See the Sunday Times, November 19, 1978.

73. J. A. G. Griffith, "Government Secrecy in the United Kingdom," in None of Your Business: Government Secrecy in America, ed. by N. Dorsen & S. Gillers (New York, 1974), 328 at p. 341.

74. See the Franks Report, Appendix II; U.K. White Paper, Reform of Section 2 of the Official Secrets Act 1911, (July, 1978) (Cmnd. 7285) at p. 6.

75. There is no reason why s. 589 of the Criminal Code (the included offences section) cannot be used to find a conviction for leakage on a charge of espionage, if, in fact, the lesser offence is properly set out in the count. A special section (s. 5) in the U.K. 1911 legislation was needed because in England until 1967 a misdemeanor could not, without legislative authority, be found as an included offence on a charge of felony. This section was not included in our 1939 Act since it was unnecessary in Canada.

76. If this were not the meaning intended there would be no need for subsection (b) relating to "any place not belonging to Her Majesty." This interpretation is clearer in the 1920 English Act: see Schedule 1.

77. It does not appear to include government offices, even though the word "offices" is in the definition, since the construction indicates that it is only telecommunication offices that are referred to.

78. Under the Defence of Canada Regulations, the definition of prohibited place could be extended by the Minister of Justice to virtually any place the Minister wanted (s. 3(1) & (4) of Defence of Canada Regulations [Consolidation] 1942). This is an interesting example of a regulation changing an Act of Parliament.

79. *Chandler* v. *D.P.P.* [1964] A.C. 763.

80. [1964] A.C. 763 at 790.

81. [1964] A.C. 763 at 799.

82. See the Sixth Report of the Royal Commission on Environmental Pollution, Cmnd. 6618 (London, 1976), paras. 309-15 and 334-36. D. Williams, in commenting on the Report, stated that "in the area of nuclear power, the concern may be shifting from the protection of secrets to the physical protection of installations" (p. 23 of Report on the Internal Protection of National Security).

83. [1964] A.C. 763 at 791.

84. See, e.g., Viscount Radcliffe at p. 794 and Lord Pierce at p. 813. So we have the curious (but not necessarily inaccurate) result that the word "purpose" in the O.S.A. is given the meaning that is often given to the word "intention", whereas in the treason-like case of *Steane* [1947] K.B. 997 the word "intention" is given the meaning that is often given to the word "purpose".

85. Subsection (b) is similar to (c), but it is limited to the verb "makes". Perhaps it was made a separate subsection because of the grammatical difficulty of including it with (c).

86. Under the Interpretation Act, R.S.C. 1970, c. I-23, s. 28, this could include a corporation, but it is not easy to envision many realistic situations where this might be the case, in contrast to the leakage section. A court would not hold a corporation *vicariously* liable for such a serious crime, but if the "directing mind or will" of the corporation, i.e., one of its senior officers, was guilty, it is conceivable that a corporation could be held *directly* liable. There are many cases where a corporation could be guilty of an offence under s. 4 because, for example, in the case of a newspaper the decision to print would be made by a person sufficiently senior in the organization to make the corporation directly liable. The only prosecution in Canada against a corporation is the one that recently took place against the *Sun*. The only charge against a corporation in England appears to have been against the Daily Telegraph in 1971. If a corporation is convicted in Canada (and England) then s. 14(3) of the Act (s. 8(5) of the 1920 U.K. Act) provides that "every director and officer of the company or corporation is guilty of the like offence unless he proves that the act or omission in constituting the offence took place without his knowledge or consent."

87. See Criminal Code s. 46(3). S. 46(2)(d), forming an intention and manifesting it by an overt act, does not apply to the espionage section, s. 46(2)(b).

88. *Joyce* v. *D.P.P.* [1946] A.C. 347.

89. For a discussion of the extradition problems connected with this section, see the House of Commons Debates, 1950, vol. IV, p. 3997.

90. See House of Commons Debates, 1950, vol. IV, pp. 4018-20. For a discussion of the extra-territorial extent of the U.K. Official Secrets Act see the Law Commission's Report (No. 91), Criminal Law; Report on the Territorial and Extraterritorial Extent of the Criminal Law (1978), at pp. 38-9.

91. See s. 8 of the 1920 U.K. Act, which had increased the penalty under s. 1 of the 1911 U.K. Act from 7 years. The 1889 U.K. Act and the 1890 Canadian Act had made the accused liable to life imprisonment. Under s. 1 of the 1911 Act there was a minimum 3 years penalty. No minimums were set in the 1939 Canadian Act.

92. See the letter of J. R. Cartwright cited in House of Commons, Debates, 1950, vol. IV, p. 4013.

93. See The Taschereau-Kellock Report, p. 447.

94. J. Aitken, Officially Secret, p. 72.

95. *R.* v. *Blake* (1961) 45 Criminal Appeal Reports 292.

96. William and Nora Kelly, Policing in Canada (Toronto, 1976), pp. 515-17.

97. See generally J. Aitken, Officially Secret, pp. 72-3 and D. Williams, Not in the Public Interest, pp. 153-5.

98. J. Aitken, Officially Secret, p. 73.

99. They do not have to be, however; in the U.K. the maximum punishment for s. 2 (leakage) offences is two years, while the maximum for s. 1 (espionage) offences is fourteen years. In the 1890 Canadian legislation there was life imprisonment for communicating information to a foreign state, but otherwise the penalty was one year.

100. See *R.* v. *Smythe* (1971), 3 C.C.C. (2d) 366 (S.C.C.) where it was held that this exercise of discretion on the part of the Attorney-General did not interfere with the concept of equality before the law.

101. The standard penalty in summary conviction matters is up to six months: Criminal Code, s. 722(1).

102. Official Secrets Act 1920, s. 8, creating a 3 month penalty.

103. S. 301.1 of the Criminal Code (theft, forgery, etc. of a credit card) is the closest to this in the Code. There, the punishment for the indictable offence is 10 years and for the summary offence 6 months.

104. *Chandler* v. *D.P.P.* [1964] A.C. 763.

105. See the discussion in the treason section *supra.*

106. [1964] A.C. 763 at 813.

107. Crimes Act 1914-1973, s. 78(1).

108. See *infra,* Conclusion to Part Two.

109. See s. 1(3).

110. See the Law Commission (England), Working Paper No. 72, pp. 55-56 where this phrase is discussed.

111. See *supra.*

112. *R.* v. *Parrott* (1913) 8 Criminal Appeal Reports 186.

113. At p. 192.

114. House of Commons, Debates, 1939, vol. 4, p. 4722.

115. It is also likely that the English courts would construe the section so that the communication was *intended to be to the enemy or potential* enemy, although the section could be read to make it an offence to communicate to any person, even though not connected with the enemy, information that, if it had been communicated to an enemy, "might . . . be useful to an enemy."

116. Judgment no. 5626, Court of Preliminary Inquiry, District of Montreal. This judgment is unreported. A subsequent attempt by the Crown to bring a preferred indictment was unsuccessful on the basis that, having tried initially by means of a preliminary hearing the Crown cannot put the matter on a different footing by preferring an indictment without a further inquiry: *R.* v. *Biernacki* (1962) 37 C.R. 226.

117. Judgment no. 5626, p. 3.

118. See also Maxwell Cohen, "Secrecy in Law and Policy: the Canadian Experience and International Relations" in T. M. Franck and E. Weisband, Secrecy and Foreign Policy (New York, 1974) 356 at pp. 358-9.

119. Official Secrets Act 1920, s. 10.

120. D. Williams, Not in the Public Interest, pp. 23-24; T. Bunyan, The History and Practice of the Secret Police in Britain, pp. 7-8.

121. The Franks Report, p. 125.

122. See *R.* v. *Crisp and Homewood* (1919) 83 Justice of the Peace 121 where a government employee who supplied and a tailor who received information relating to contracts for military uniforms were found guilty of violating the leakage section. It should be noted, however, that the trial judge, Avory J., said that "there is evidence that these documents were official secrets." See also the same interpretation as in *Crisp and Homewood* by Mars-Jones J. in the *ABC Case,* discussed in Nicol, "Official Secrets and Jury Vetting" [1979] Crim. L.R. 284 at pp. 288-9.

123. The Minister of Justice did say that the Bill was designed "to prevent spying and to inflict penalties on persons who are trying to betray official secrets" (House of Commons, Debates, 1939, vol. 4, p. 4720), but this was said during the debate in order to point out to another member that he was off topic in discussing propaganda.

124. Official Secrets Act, ss. 3(1)(c), 3(2), 4(1), 4(1)(d), 4(3), 4(4)(b) [twice], 5(1)(d) [twice].

125. Ss. 3(1)(c), 4(1), 4(3) use a comma; ss. 3(2), 4(1)(d), 4(4)(b), 5(1)(d), do not.

126. Ss. 2(2) and 4(1)(d).

127. See *R.* v. *Crisp and Homewood* (1919) 83 Justice of the Peace 121.

128. See the Report of the Commission of Inquiry into Complaints Made by George Victor Spencer (Ottawa, 1966); see also Nora and William Kelly, The Royal Canadian Mounted Police, pp. 268-74.

129. *Boyer* v. *The King* (1948) 7 C.R. 165 (Que. C.A.).

130. William and Nora Kelly, Policing in Canada, pp. 515-17.

131. The Report of the Commission of Inquiry into Complaints Made by George Victor Spencer, p 57. *Cf.* William and Nora Kelly, Policing in Canada, p. 524. S. 46(e) of the Criminal Code, now s. 46(2)(b), makes the communication of scientific or military information treason. See *supra* for a discussion of this section and treason generally.

132. The Report of the Commission of Inquiry into Complaints Made by George Victor Spencer, p. 57.

133. The Report of the Commission of Inquiry into Complaints Made by George Victor Spencer, p. 56.

134. *Boyer* v. *The King* (1948) 7 C.R. 165 (Que. C.A.).

135. *Boyer* v. *The King* (1948) 7 C.R. 165 at 237-38.

136. *Peda* v. *The Queen* [1969] 4 C.C.C. 245 (S.C.C.).

137. The Report of the Royal Commission on Security, p. 77.

138. The Report of the Royal Commission on Security, p. 76.

139. T. Bunyan, The History and Practice of the Political Police in Britain, pp. 7-9.

140. See *R.* v. *Parrott* (1913) 8 Criminal Appeal Reports 186 at p. 192; D. Williams, Not in the Public Interest, p. 31.

141. Edgar & Schmidt, "The Espionage Statutes and Publication of Defense Information," (1973) 73 Columbia Law Review 929 at p. 1003, n. 184.

142. *R.* v. *Benning* [1947] 3 D.L.R. 908 (Ont. C.A.).

143. *R.* v. *Benning* [1947] 3 D.L.R. 908 at 915.

144. *Ibid.* at p. 917.

145. The case also points out difficulties with the subsection, particularly the fact that it only makes the facts evidence that the accused "obtained or attempted to obtain information" and nothing is said about evidence that the accused communicated the information (*R.* v. *Benning* [1947] 3 D.L.R. 908 at 914.).

146. See House of Commons, Debates, 1950, vol. 4, p. 4013 where the Minister of Justice quotes a letter from Mr. Cartwright to Arthur Slaght, counsel to the Criminal Code Revision Committee.

147. *R.* v. *Harris* [1947] 4 D.L.R. 796 at 799 (Ont. C.A.); *Boyer* v. *The King* (1948) 7 C.R. 165 at 227 (Que. C.A.).

148. R.S.C. 1970, Appendix III as amended.

149. War Measures Act, R.S.C. 1970, c. W-2, s. 6(5).

150. *R.* v. *Drybones* (1969) 9 D.L.R. (3d) 473 (S.C.C.).

151. See *R.* v. *Sharpe* (1961) 35 C.R. 375 (Ont. C.A.) and generally W. S. Tarnopolsky, The Canadian Bill of Rights (Toronto, 1966), pp. 188-90.

152. See, for example, *Scott* v. *Scott* [1913] A.C. 417.

153. S. 14(2). The U.K. Act uses the phrase "national safety". *Quaere* whether there is a difference.

154. *Scott* v. *Scott* [1913] A.C. 417.

155A. See *A.-G.* v. *Leveller Magazine Ltd.* [1979] 2 W.L.R. 247 at p. 271 *per* Lord Scarman: "In *Scott* v. *Scott* your Lordships' House affirmed the general rule of the common law that justice must be administered in public. Certain exceptions were, however, recognised. The interest of national security was not one of them; indeed, it was not mentioned in any of the speeches. . . . It follows: (1) that, in the absence of express statutory provision (e.g., section 8(4) of the Act of 1920), a court cannot sit in private merely because it believes that to sit in public would be prejudicial to national safety, (2) that, if the factor of national safety appears to endanger the due administration of justice, e.g., by deterring the Crown from prosecuting in cases where it should do so, a court may sit in private, (3) that there must be material (not necessarily formally adduced evidence) made known to the court upon which it can reasonably reach its conclusion." See also p. 252 *per* Lord Diplock and p. 258 *per* Viscount Dilhorne. See also to the same effect, Mewett, "Public Criminal Trials" (1978-79) 21 Crim. L.Q. 199 who refers to the Official Secrets Act and s. 442 of the Code and states (at p. 213): "I would submit that . . . an open trial is mandatory except on the grounds set out and that any possible common law power no longer exists."

156. See, for example, *Benning* v. *Attorney-General for Saskatchewan et al.* (1963) 41 W.W.R. 497 (Sask. Q.B.); see also Tarnopolsky, The Canadian Bill of Rights, pp. 190-91.

157. *Cf.* the Australian Act (Crimes Act 1914-1973, Part VII, s. 85B) mentioned by M. MacGuigan in the House of Commons special debate on the Official Secrets Act (House of Commons, Debates, June 9, 1978, p. 6251). This apparently permits the entire trial to be held in secret: the section provides that the judge "at any time before or during the hearing . . . may . . . order that some or all of the members of the public shall be excluded during the whole or a part of the hearing of the application or proceedings." In Canada, some provincial Acts, such as the Statutory Powers Procedure Act, Stat. Ont. 1971, c. 47, s. 9(1)(a) and the Family Law Reform Act, 1978, Stat. Ont. 1978, c. 2, s. 2(6) appear to permit the whole proceedings to be held *in camera*.

158. See the discussion by Mr. Paul Dick, House of Commons, Debates, June 9, 1978, pp. 6257-59.

159. *Cf.* the language of the Family Law Reform Act, 1978, s. 2(6): "a hearing, or any part thereof."

160. *Treu* v. *The Queen,* Feb. 20, 1979, as yet unreported. For a discussion of the *in camera* procedure in the case, see House of Commons, Debates, June 9, 1978, pp. 6242-43.

161. Otto Lang, House of Commons, Debates, June 9, 1978, p. 6243.

162. Translated in the speech by Otto Lang, House of Commons, Debates, June 9, 1978, p. 6243.

163. At p. 3.

164. *R.* v. *Biernacki* (1961), judgment no. 5626, Court of Preliminary Inquiry, District of Montreal. See Paul Dick, House of Commons, Debates, June 9, 1978, p. 6258.

165. See The Times, May 2-5 and May 20, 1978.

166. *Attorney-General* v. *Leveller Magazine Ltd.* [1978] 3 W.L.R. 395 at pp. 402-3.

167. *A.-G.* v. *Leveller Magazine* [1979] 2 W.L.R. 247. See David Williams, "The ABC Case 1977-78" (a paper prepared for the McDonald Commission). See also (1978) 128 New Law Journal, p. 497; David Williams, "Colonel B and Contempt of Court" [1978] Camb. L.J. 196.

168. See Nicol, "Official Secrets and Jury Vetting" [1979] Crim. L.R. 284.

169. See generally, the Report of the Select Committee on Intelligence, Subcommittee on Secrecy and Disclosure, Oct. 4, 1978.

170. *Ibid.* at p. 21 *et seq.*

171. *Ibid.* at p. 62.

172. See House of Commons, Debates, 1946, vol. 1, pp. 55-56, 85, 137-40, 170-173; and W. Eggleston, "The Report of the Royal Commission on Espionage," (1946) 53 Queen's Quarterly 369 at pp. 375-78. M. H. Fyfe, "Some Legal Aspects of the Report of the Royal Commission on Espionage," (1946) 24 Canadian Bar Review 777 was critical of the Commission on other grounds.

173. See The Taschereau-Kellock Report, pp. 649-50.

174. See s. 6 of the 1920 Act, discussed below.

175. S. 10.

176. Criminal Code, s. 450(1)(a).

177. The Official Secrets Act could be read as allowing *anyone,* and not just a peace officer, to arrest on suspicion. On the other hand, the words "by any constable or peace officer" could be read as qualifying the arrest. It is clear, though, that the accused could only be detained by a police officer.

178. The word "and" in the clause "aids or abets *and* does any act preparatory to the commission of an offence" in s. 9 has been interpreted as an "or": see *R.* v. *Oakes* [1959] 2 All E.R. 92 (C.C.A.); *R.* v. *Bingham* [1973] 1 Q.B. 870 (C.C.A.); *R.* v. *Biernacki* (1961), judgment no. 5626, Court of Preliminary Inquiry, District of Montreal, pp. 24-28; The Taschereau-Kellock Report, p. 654; The Franks Report, p. 115. The section therefore goes further than the common law of attempt: see Smith and Hogan, Criminal Law (4th ed., 1978) at p. 812.

179. The Taschereau-Kellock Report, pp. 654-55.

180. The Taschereau-Kellock Report, p. 655.

181. Criminal Code, s. 454(1). The code, in fact, now allows the police to release the person arrested without bringing him before a Justice of the Peace: ss. 452-453.1.

182. See D. Williams, Report on the Internal Protection of National Security, p. 28 where he cites the 1956 Conference of Privy Councillors on Security as saying that "he must be brought before the courts on a charge without delay."

183. S. 443(1). See also s. 447.

184. R.S.C. 1970, c. N-1, as amended, s. 10(2).

185. It should also be noted that a search can take place for an offence "about to be committed." A similar, but limited, power is conferred under s. 443(1)(c) of the Code permitting a search for "anything that there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person. . . ."

186. S. 11. *Cf.* the Narcotic Control Act, R.S.C. 1970, c. N-1, as amended, s. 10(1)(b).

187. S. 17(2) of the R.C.M.P. Act, R.S.C. 1970, c. R-9, makes every R.C.M.P. officer of the rank of superintendent or higher *ex officio* a Justice of the Peace. The proposed Act to amend the R.C.M.P. Act, Bill C-50, introduced April 28, 1978, but not enacted at the end of the last Session, would repeal s. 17(2), the explanatory note to the Bill stating, "they are no longer serving any particular need."

188. See D. Williams, Not in the Public Interest, pp. 73-74.

189. Report from the Select Committee on the Official Secrets Acts, House of Commons, Document No. 101, Session 1938-1939 (5 April 1939).

190. S. 8.

191. S. 52.

192. *Boyer* v. *The King* (1948) 7 C.R. 165 at 237-38.

193. Final Report of the National Commission on Reform of Federal Criminal Laws (Proposed New Federal Criminal Code) § 1112(1)(a). The latest version, S. 1437, which was passed by the Senate in January 1978 (but has been stalled in the House) does not attempt reform along these lines, but maintains the status quo: see § 1121 *et seq.* See also the Report of the Senate Committee on the Judiciary to accompany S. 1437 at pp. 211 *et seq.*: "it was determined by the principal sponsors of S. 1437, prior to its introduction, with the concurrence of the Department of Justice, that no reform in this area would be attempted and that the matter would be reserved for future attention by the Congress." See also the Final Report of the Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities, (the Church Report), (1976), Book II, at p. 339, which recommended that Congressional Committees review the Espionage Acts. See also Book I, at pp. 174 *et seq.*

194. Final Report of the National Commission on Reform of Federal Criminal Laws (Proposed New Federal Criminal Code), § 1112(1)(b).

195. Final Report of the National Commission on Reform of Federal Criminal Laws (Proposed New Federal Criminal Code), § 1112(4)(a)(vii).

196. Final Report of the National Commission on Reform of Federal Criminal Laws (Proposed New Federal Criminal Code), p. 87. See also Working Papers of the National Commission on Reform of Federal Criminal Laws, (Washington, 1970), vol. 1, pp. 450-54, and Edgar and Schmidt, "The Espionage Statutes and Publication of Defense Information", (1973) 73 Columbia Law Review 929 at p. 983.

197. The U.S. Espionage Statutes are codified in Title 18, U.S.C. § 793-98. For a very thorough discussion of the U.S. Espionage Act see Edgar and Schmidt, "The Espionage Statutes and Publication of Defense Information", (1973) 73 Columbia Law Review 929.

198. (1941) 312 U.S. 19 at p. 28.

199. (1945) 151 F.2d 813 (2d Cir.), cert. to the Supreme Court denied.

200. *U.S.* v. *Heine* (1945) 151 F.2d 813 at 815.

201. *U.S.* v. *Heine* (1945) 151 F.2d 813 at 815.

202. *U.S.* v. *Heine* (1945) 151 F.2d 813 at 816.

203. See, for example, Edgar and Schmidt, "The Espionage Statutes and Publication of Defense Information", (1973) 73 Columbia Law Review 929 at p. 983.

204. Crimes Act 1914-1973, Part VII.

205. Note that the Brown Commission section defines "foreign power" to include "any armed insurrection within the United States." Final Report of the National Commission on Reform of the Federal Criminal Laws (Proposed New Federal Criminal Code), § 1112(4)(c).

206. R.S.C. 1970, c. 2 (2nd Supp.) (Bail Reform Act).

207. Stat. Can. 1973-74, c. 50.

208. The *Queen* v. *Hauser,* decided May 1, 1979, as yet unreported. See also *Cordes* v. *The Queen,* also decided by the Supreme Court on May 1, 1979.

209. Pigeon, Martland, Ritchie and Beetz J.J., Spence J. concurring, would have gone further and given Parliament authority to enact conditions in respect of the institution and the conduct of criminal proceedings on the basis that these are necessarily incidental to the powers given to the Parliament of Canada under the Criminal Law Power. Laskin C. J. and Estey J. did not take part in the case.

(notes to page 51 of text)

210. The majority held that conspiracy to breach the narcotics laws, technically an offence under the Code, would still be subject to Federal control.

211. S. 91(7) of the B.N.A. Act: "Militia, Military and Naval Service, and Defence."

212. With whom Pratte J. concurred. Of course the dissenting opinion would have denied the Federal government control of prosecutions under the Narcotic Control Act.

Part Three: GOVERNMENT INFORMATION

(notes to pages 53-54 of text)

1. Official Secrets Act, R.S.C. 1970, c. 0-3, s. 4.

2. Report of the Departmental Committee on Section 2 of the Official Secrets Act 1911, Cmnd. 5104 (London, 1972) [hereinafter referred to as the Franks Report], p. 31. See also A. Siegel, "The Interaction of the Press and Parliament in Canada", a Paper prepared for presentation to the 48th Annual Meeting of the Canadian Political Science Assoc., Quebec City, Spring 1976.

3. Reform of Section 2 of the Official Secrets Act 1911, Cmnd. 7285 (London, 1978); see The Times, July 20, 1978, p. 4, where excerpts from the White paper are given. See also the Report by Justice, Freedom of Information (1978, A. Lincoln, chairman) at p. 5.

4. Pp. 18-19.

5. (June, 1977), pp. 14-15.

6. Reform of Section 2 of the Official Secrets Act 1911, p. 4.

7. Note the establishment of public inquiries under Mr. Justice Krever in Ontario into OHIP file disclosures; under Mr. Justice Laycraft in Alberta into use by the RCMP of government files compiled for other purposes in their investigation of a U.S. midway company; and under Carlton Williams in Ontario into the whole question of privacy and information.

8. Edgar and Schmidt, "The Espionage Statutes and Publication of Defense Information," (1973) 73 Columbia Law Review 929 at 1077.

9. See *supra,* The Official Secrets Act, Secrecy, for a discussion of the Colonel B case, *Attorney-General* v. *Leveller Magazine* [1979] 2 W.L.R. 247 (H.L.).

I. THE OFFICIAL SECRETS ACT: LEAKAGE (notes to pages 54-56 of text)

1. Official Secrets Act, R.S.C. 1970, c. 0-3, s. 15(1).

2. See also s. 4(2) of the present Act, also first introduced in 1920, which deals with the communication to a foreign power of information relating to "munitions of war."

3. See The Franks Report, p. 125 and *R.* v. *Crisp and Homewood* (1919)83 Justice of the Peace 121. In both England and Canada the marginal note simply states "wrongful communication etc. of information". See also B. A. Crane, "Freedom of the Press and National Security," (1975) 21 McGill L.J. 148 at 151 where he states that the opposite interpretation is "scarcely arguable". *Cf.* D. C. Rowat, Public Access to Government Documents: A Comparative Perspective (November, 1978), a research publication prepared for the Ontario Commission on Freedom of Information and Individual Privacy, at p. 74; M. Cohen, "Secrecy in Law and Policy: The Canadian Experience and International Relations" in T. M. Franck and E. Weisband (eds.), Secrecy and Foreign Policy (New York, 1974) at p. 357.

4. The Franks Report, p. 14.

5. Sir Lionel Heald, Q.C. in The Times, March 20, 1970, p. 13 cited in David Williams, "Official Secrecy and the Courts" in P. R. Glazebrook (ed.), Reshaping the Criminal Law (London, 1978) at pp. 160-1.

6. S. 2(1). My italics. The 1890 Act, discussed earlier in the History section, and the 1892 Criminal Code provisions included provincial officials. It is not clear whether the 1911 English Act which applied to Canada, would have been construed as extending to provincial disclosures.

7. See s. 12 and the definition of Attorney-General in s. 2(1).

8. See generally, Friedland, "Pressure Groups and the Development of the Criminal Law" in P. R. Glazebrook (ed.), Reshaping the Criminal Law (London, 1978) at pp. 202 *et seq.*

9. The Franks Report, p. 14. See also Reform of Section 2 of the Official Secrets Act 1911, p. 6.

10. See The Franks Report, pp. 18-19, E. C. S. Wade and G. G. Phillips, Constitutional and Administrative Law (London, 9th ed., A. W. Bradley, ed., 1977) at p. 525.

11. The Franks Report, p. 106. See also pp. 80-2.

12. See The Franks Report, pp. 19-20; and see the evidence given by Gordon Robertson before the Standing Joint Committee on Regulations and Other Statutory Instruments (Issue No. 32), June 25, 1975 at p. 15.

13. Atomic Energy Control Act, R.S.C. 1970, c. A-19; Bank of Canada Act, R.S.C. 1970, c. B-2; Central Mortgage and Housing Act, R.S.C. 1970, c. C-16; Industrial Development Bank Act, R.S.C. 1970, c. I-9; Surplus Crown Assets Act, R.S.C. 1970, c. S-20. See generally, F. Pepin, "Prohibitions against the Release of Government Information contained in the Statutes of Canada" printed in Appendix "RSI-17" to Minutes of Standing Joint Committee on Regulations and Other Statutory Instruments, April 18, 1978.

14. Public Service Employment Act, R.S.C. 1970, c. P-32, Schedule III.

15. See *supra*. The Canadian Daily Newspaper Publishers Association passed a resolution condemning the Government for prosecuting the Toronto Sun: see the Globe and Mail, April 21, 1978.

16. See J. Aitken, Officially Secret (London, 1971) for a discussion of the Sunday Telegraph prosecution. See also B. Crane, "Freedom of the Press and National Security" (1975) 21 McGill L.J. 148 at p. 152, and T. Bunyan, The History and Practice of the Political Police in Britain (London, 1977) p. 10.

17. Reform of Section 2 of the Official Secrets Act 1911, p. 17.

18. See *Treu* v. *The Queen,* 20 February 1979, as yet unreported. See also The Franks Report, pp. 15-16; D. Williams, "Official Secrecy and the Courts" in P. R. Glazebrook (ed.), Reshaping the Criminal Law (London, 1978) 154 at pp. 164-65; B. Crane, "Freedom of the Press and National Security," (1975) 21 McGill L.J. 148 at p. 152; Griffiths, "Government Secrecy in the United Kingdom" in None of Your Business, N. Dorsen and S. Gillers (eds.) (New York, 1974), 328 at p. 344; Aitken, Officially Secret, pp. 22 and 55-6. S. 4(1)(d) makes it an offence to fail to take reasonable care of documents, an offence of mere negligence.

19. *New York Times Co.* v. *U.S.* (1971) 403 U.S. 713; Edgar and Schmidt, "The Espionage Statutes and Publication of Defense Information", (1973) 73 Columbia Law Review 929; M. B. Nimmer, "National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case" (1974) 26 Stanford Law Review 311; A. M. Katz, "Government Information Leaks and the First Amendment", (1976) 64 California Law Review 108.

20. "The Espionage Statutes and Publication of Defense Information" (1973) 73 Columbia L. Rev. 929 at 931.

21. See *U.S.* v. *Marchetti* (1972) 466 F.2d 1309 (C.A., 4th Cir.) cert. denied (1972) 93 S. Ct. 553 for a successful restraint on the publication of a book by a former CIA agent.

22. See M. B. Nimmer, "National Security Secrets v. Free Speech" (1974) 26 Stanford L.R. 311. Nimmer appeared in the case as attorney for the American Civil Liberties Union and argues in the article that Ellsberg and Russo would not have been convicted. See also the introduction by Anthony Lewis to None of Your Business, (Dorsen and Gillers, eds.) at p. 22: "an astonishing attempt to create an American Official Secrets Act by distorted interpretation of old statutes on other subjects".

23. Edgar and Schmidt, "The Espionage Statutes and the Publication of Defense Information," at p. 935.

24. Report of the National Commission on Reform of Federal Criminal Laws (Proposed New Federal Criminal Code) (1971). § 1114 deals with the misuse of classified communications information; and § 1115 deals with a public servant or former public servant communicating classified information to a foreign government. See also § 1371 which prohibits the unlawful disclosure of confidential information, a prohibition designed to protect those members of the public required to make disclosures to the government.

25. See L. B. Schwartz, "Reform of the Federal Criminal Laws," [1977] Duke Law Journal 171 at pp. 197-98; D. Wise, "Pressures on the Press," in None of Your Business, Dorsen and Gillers (eds.) (New York, 1974), 217 at pp. 229-31.

26. At the time this is being written the U.K. Government has not introduced legislation in line with the White Paper. A private member, Clement Freud, who came at the top of the ballot for private members bills, had introduced an Official Information Bill (see New Statesman, January 12, 1979), but this died on the dissolution of Parliament.

27. Report of the Royal Commission on Security (Abridged) (June, 1969), p. 77. Classified information is defined on pp. 69-71.

28. See Reform of Section 2 of the Official Secrets Act 1911, p. 13; The Franks Report, pp. 55-56; The Report of the Royal Commission on Security, pp. 68-73.

29. Reform of Section 2 of the Official Secrets Act 1911, pp. 9-10.

30. Reform of Section 2 of the Official Secrets Act 1911, pp. 14 and 18.

31. Reform of Section 2 of the Official Secrets Act 1911, p. 10.

32. Reform of Section 2 of the Official Secrets Act 1911, p. 16.

33. Reform of Section 2 of the Official Secrets Act 1911, p. 16.

34. Reform of Section 2 of the Official Secrets Act 1911, p. 10. See also D. Williams, "Official Secrecy and the Courts," in P. R. Glazebrook (ed.) Reshaping the Criminal Law (London, 1978) 154 at pp. 168-9.

35. Report of the Royal Commission on Security, p. 77.

36. The Franks Report, pp. 55 *et seq.*

37. The Franks Report, p. 61.

II. SPECIAL DEMANDS FOR GOVERNMENT INFORMATION (notes to page 60 of text)

1. The wider term shows that the privilege is not confined to the Crown. See H. W. R. Wade, Administrative Law (4th ed., Oxford, 1977) at pp. 689 *et seq.;* Denning, The Discipline of Law (London, 1979) at pp. 304-5.

2. See Cappelletti and Golden, "Crown Privilege and Executive Privilege: A British Response to an American Controversy" (1973) 25 Stanford L. Rev. 836.

3. For a full discussion see R. Berger, "Executive Privilege v. Congressional Inquiry," (1965) 12 UCLA Law Review 1043.

4. R.S.C. 1970, c. 10 (2nd Supp.). Discussions of Crown privilege in Canada can be found in Koroway, "Confidentiality in the Law of Evidence" (1978) 16 Osgoode Hall L.J. 361; Ontario Law Reform Commission, Report on the Law of Evidence (1976); Lieberman, "Executive Privilege" (1975) 33 U.T. Fac. L. Rev. 181; Bushnell, "Crown Privilege" (1973) 51 Can. B. Rev. 551; Lederman, "The Crown's Right to Suppress Information Sought in the Litigation Process: The Elusive Public Interest" (1973) 8 U.B.C.L. Rev. 273.

5. See *Conway* v. *Rimmer* [1968] A.C. 910 overruling or modifying *Duncan* v. *Cammell Laird* [1942] A.C. 624; *R.* v. *Snider* [1954] S.C.R. 479; and *Gagnon* v. *Quebec Security Commission* (1964) 50 D.L.R. 329 (S.C.C.).

6. See *Landreville* v. *The Queen* [1977] 1 F.C. 419 (Trial Div.). *Cf.* John Turner's comment that this section was an "attempt to codify the principles relating to the production and discovery of documents in a court": House of Commons, Debates, October 29, 1970, v. 1, p. 697.

7. [1968] A.C. 910.

8. *R.* v. *Snider* [1954] S.C.R. 479.

9. *Gagnon* v. *Quebec Security Commission* (1964) 50 D.L.R. 329 (S.C.C.).

10. [1942] A.C. 624.

11. The case was much broader than claims involving national security in wartime. It extended to circumstances "where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service": Viscount Simon at p. 642.

12. [1942] A.C. 624 at 642.

13. [1942] A.C. 624 at 633-34, a distinction developed by the Supreme Court of Canada in *R.* v. *Snider* [1954] S.C.R. 479.

14. See [1968] A.C. 910 at 950 *per* Lord Reid; 956 *per* Lord Morris; 979 *per* Lord Hodson; 984 *per* Lord Pearce.

15. *D.* v. *National Society for the Prevention of Cruelty to Children* [1977] 1 A11 E.R. 589 at 607 (H.L.) (emphasis added).

16. House of Commons, Debates, October 29, 1970, vol. 1, p. 697.

17. Report on Evidence of the Law Reform Commission of Canada (Ottawa, 1975), p. 82. See also the Report of the Standing Joint Committee on Regulations and Other Statutory Instruments (appended to the Senate Debates of June 30, 1978) recommending that the section be repealed.

18. S. 43(6) of the Proposed Evidence Code.

19. S. 87 of the Proposed Evidence Code. Note, however, that s. 43(2) of the Evidence Code refers to "the proper administration of justice" which is difficult to apply to fact-finding inquiries.

20. See the comments of John Turner, Minister of Justice, House of Commons, Debates, October 29, 1970, vol. 1, p. 697: "I might say that clause 41 is not limited to the federal court but applies as against the crown in right of Canada in any court, including the provincial courts."

21. *A.-G. Quebec and Keable* v. *A.-G. Canada,* (1978) 43 C.C.C. (2d) 49.

22. *Re Royal Commission of Inquiry into the Activities of Royal American Shows Inc.* (1977) 39 C.C.C. (2d) 28 at pp. 33-4.

23. See Paré J. A., *Re Attorney General of Canada and Keable* (1978) 41 C.C.C. (2d) 452 at p. 482 (Quebec C.A.). *Cf.* the reasoning of Kaufman J. A.

24. At p. 72.

25. J. Jacob, "Discovery and Public Interest," [1976] Public Law 134 at p. 135.

26. [1968] A.C. 910 at 928. See also the Crossman Diaries case, *Attorney-General* v. *Jonathan Cape* [1975] 3 A11 E.R. 484 at p. 493.

27. *Re A.-G. of Canada and Keable* (1978) 41 C.C.C. (2d) 452 at p. 483.

28. Judge Paré's judgment relies on s. 4(4) of the Official Secrets Act, which provides that "every person is guilty of an offence under this Act who . . . (b) allows any other person to have possession of any official document issued for his use alone." Judge Paré held that the R.C.M.P. documents were "official documents" within the meaning of this section. However, if one examines the history of this provision, it can be seen that the words "official documents" should be given the technical meaning that they have in s. 5(1)(c) where an "official document" is a "passport or any military, police or official pass, permit, certificate, licence or other document of a similar character." What are now our s. 4(4) and s. 5 were introduced in the 1920 U.K. Act as a single section. If our s. 4(4) came after s. 5(1)(c), as the comparable sections did in the 1920 English

Official Secrets Act, then the above interpretation of "official document" would have been obvious; the words "hereinafter in this section referred to as an 'official document'," which are found in s. 5(1)(c), would have automatically been applied to the present s. 4(4). Somehow the sections were improperly mixed up in 1939.

29. At p. 75.

30. The guidelines, dated February 16, 1973, are set out in Appendix I to the Government Green Paper, Legislation on Public Access to Government Documents (Ottawa, June, 1977).

31. How would a government prevent the production of papers before a Senate Committee if the majority of the Senate were not supporters of the party in power?

32. See C. E. S. Franks' study for the Commission, Parliament and Security Matters. See also Proceedings of Justice and Legal Affairs (Issue No. 7) Dec. 20, 1978, at pp. 15 *et seq.*

33. *Rose* v. *The King* [1947] 3 D.L.R. 618 (Que. C.A.).

34. Report from the Select Committee on the Official Secrets Act, H.C. Doc. No. 101 (1939). See also C. Parry, "Legislatures and Secrecy," (1954) 67 Harvard Law Review 737 at 773 *et seq; Re Clark et al and A.-G. of Canada* (1977) 17 O.R. (2d) 593 at 615. Parry in his article points out that there is "a functional rather than a territorial conception of privilege" (at p. 777).

35. *Re Clark et al. and A.-G. of Canada* (1977) 17 O.R. (2d) 593.

36. See the letter to the London Times, 28 April 1978 by Graham Zellick. They can, however, reproduce what is printed in Hansard; see the U.K. Parliamentary Papers Act, 1840, 3 Vict. c. 9, s. 3; and the Canadian Senate and House of Commons Act, R.S.C. 1970, c. S-8, s. 9. In the "Colonel B affair" the Press was not prosecuted for publishing what was said in Parliament.

37. See House of Commons, Debates, March 17, 1978, p. 3882.

38. House of Commons, Debates, March 17, 1978, p. 3882.

39. House of Commons, Debates, March 7, 1978, p. 3520; March 17, 1978, p. 3882; June 9, 1978, p. 6260.

40. Parry, "Legislatures and Secrecy", p. 779.

41. Stat. Can. 1977, c. 33.

42. S. 52(1).

43. S. 52(2). See Reform of Section 2 of the Official Secrets Act 1911, Cmnd. 7285 (London, July, 1978), paras. 27 *et seq.* which recommends the creation of criminal liability for the improper disclosure of such confidences.

44. S. 54(a) and (d)(ii).

45. S. 53.

46. S. 58.

47. Globe and Mail, June 22, 1978; House of Commons, Debates, June 29, 1978, p. 6850.

48. See s. 62.

49. No. 48, superceding Cabinet Directive No. 46 of June 7, 1973, which is set out as Appendix 2 of the Green Paper, Legislation on Public Access to Government Documents, June, 1977. See also pp. 14 & 15 of the Green Paper; and Hansard, May 1, 1969, pp. 8199-8200.

50. S. 2(4)(c).

51. There is a similar 30 year time period in England. See the Public Records Acts 1958-1967: see David Williams, Report, The Internal Protection of National Security, at p. 3. The time period was previously 50 years: see Rowat, "How Much Administrative Secrecy?" (1965) 31 Can. J. of Ec. & P. Sc. 479 at pp. 483-4. See generally, T. M. Rankin, Freedom of Information in Canada: Will the Doors Stay Shut? (Ottawa, 1977).

52. The 1973 Directive certainly gave the impression that all documents over 30 years old that were in the Public Archives would be open to inspection. The 1977 Directive added the words "that is not an exempted record."

53. Hansard, May 31, 1978, at p. 5921.

III. FREEDOM OF INFORMATION LAWS (notes to pages 66-67 of text)

1. See generally, Friedland, "Pressure Groups and the Development of the Criminal Law" in P. R. Glazebrook (editor), Reshaping the Criminal Law (London, 1978) at p. 202 *et seq.*

2. See Friedland, Access to the Law: A Study Prepared for the Law Reform Commission of Canada (Toronto, 1975).

3. See Weinstein, "Open Season on 'Open Government' " New York Times Magazine, June 10, 1979, 32 at p. 74: "Today, more than three out of every five F.O.I.A. requests are filed . . . by the business community and the law firms that represent it."

4. See Friedland, "Pressure Groups and the Development of the Criminal Law". See also D. V. Smiley, "The Freedom of Information Issue: A Political Analysis" (September, 1978) at p. 19, a study prepared for the Ontario Commission on Freedom of Information and Individual Privacy (D. C. Williams, chairman).

5. See, e.g., Rowat, "How Much Administrative Secrecy?" (1965) 31 Can. J. Ec. and Pol. Science 479; Abel, "Administrative Secrecy" (1968) 11 Can. Pub. Admin. 440; T. M. Rankin, Freedom of Information in Canada: Will the Doors Stay Shut? (Ottawa, 1977). See also Gordon Robertson, Official Responsibility, Private Conscience and Public Information, Royal Society, 1972; Robertson, "Confidentiality in Government" (1978) 6 Archivaria 3. The Ontario Commission on Freedom of Information and Individual Privacy (D. C. Williams, chairman) has at the time this is being written issued six research publications: see in particular the first three, D. V. Smiley, "The Freedom of Information Issue: A Political Analysis" (September, 1978); K. Kernaghan, "Freedom of Information and Ministerial Responsibility" (September, 1978); and D. C. Rowat, "Public Access to Government Documents: A Comparative Perspective" (Nov., 1978), a research publication prepared for the Ontario Commission on Freedom of Information and Individual Privacy. The latter study not only includes discussion of developments in Sweden, other Scandinavian countries, the United States and Australia, but also developments in Canada both at the federal and provincial levels. See also D. C. Rowat (ed.), Administrative Secrecy in Developed Countries (London, 1979), a book already published in French, Le Secret Administratif dans les Pays Développés (Montreal, 1977); I. Galnoor (ed.), Government Secrecy in Democracies (New York, 1977); Disclosure of Official Information: a Report on Overseas Practice (HMSO 1979) (a study of the practice of open government in nine countries), a summary of which is contained in the U.K. Green Paper, Open Government, Cmnd. 7520, March, 1979, at pp. 9 *et seq.* R. D. French, "Freedom of Information and Parliament", February 1979, prepared for The Conference on Legislative Studies in Canada, Simon Fraser University.

6. See generally c. 2 of Rankin, Freedom of Information in Canada: Will the Doors Stay Shut? (Ottawa, 1977); David Johansen, "Public Access to Government Information: A Comparative Study" (October, 1977) appended to April 4, 1978 Proceedings of the Standing Joint Committee on Regulations and Other Statutory Instruments. See also the yearly notes on developments in the U.S. under the Freedom of Information Act in the Duke Law Journal. The first was in [1970] Duke L. J. 67, and the latest is Note, "Developments under the Freedom of Information Act — 1977" [1978] Duke L. J. 189.

7. Public Law No. 93-502. The law became effective in early 1975.

8. Report of the Task Force on Information, To Know and Be Known, (Ottawa, 1969); D. F. Wall's Report, The Provision of Government Information, April 1974, set out as an appendix to the Minutes of Proceedings of the Standing Joint Committee on Regulations and Other Statutory Instruments (No. 32) June 25, 1975.

9. Reform of Section 2 of the Official Secrets Act 1911, Cmnd. 7285, (London, 1978). For a discussion of Freedom of Information in Australia, see E. Campbell and H. Whitmore, Freedom in Australia (Sydney, 1973), Chapter 18; K. Kernaghan, "Freedom of Information and Ministerial Responsibility", Research Publication 2 (Ontario Commission on Freedom of Information and Individual Privacy), September, 1978, pp. 43-5.

10. Freedom of Information (1978, A. Lincoln, chairman).

11. Cmnd. 7520.

12. At p. 3.

13. P. 18 of the U.K. White Paper.

14. P. 19 of the U.K. White Paper.

15. P. 4 of the Green Paper, Open Government, March, 1979.

16. See Mark MacGuigan at p. 6251 of Hansard, June 9, 1978; Max Cohen, "Secrecy in Law and Policy: the Canadian Experience and International Relations" in T. M. Franck and E. Weisband, Secrecy and Foreign Policy (New York, 1974) 356 at p. 365.

17. Jeremy Bentham, cited in *Scott* v. *Scott* [1913] A.C. 417 at p. 477.

18. David Williams, "Official Secrecy and the Courts" in P. R. Glazebrook (ed.), Reshaping the Criminal Law (London, 1978), at p. 172.

19. Hansard, June 22, 1978 at p. 6663; see also Hansard, June 9, 1978, at p. 6254; and October 10, 1978 at p. 7057 ("we are in the very process of drafting legislation to be presented to the House in the next session").

20. See Votes and Proceedings, October 11, 1978, at p. 9. See also Recommendation 12 of the Interim Report of the Special Joint Committee of the Senate and the House of Commons on the Constitution: "The proposed Charter should provide that people are entitled to reasonable access to documents of governments and governmental agencies": Votes and Proceedings, October 10, 1978 at p. 973.

21. See the speech by the Hon. John Roberts to the National Conference on Freedom of Information, University of Victoria, March 23, 1979.

22. See Hansard, June 22, 1978 at pp. 6656 *et seq.*

23. See the Green Paper, Open Government, March, 1979 at pp. 13-14.

24. At pp. 10-11. See also the exemptions in the Report by Justice, Freedom of Information (1978). The Green Paper, Open Government, March, 1979 at p. 18 recommended that a Select Committee of the House be appointed to work out the details.

25. Their Report is appended to the Senate Debates of June 30, 1978. See also "Freedom of Information in Canada: A Model Bill" prepared by the C.B.A.'s Special Committee on Freedom of Information, March, 1979.

26. The U.S. Freedom of Information Act does not use the term: see Rankin at pp. 66 *et seq.* See also the Canadian Bar Association Brief appended to the Minutes of the Standing Joint Committee on Regulations and Other Statutory Instruments (Issue No. 19), April 4, 1978, at pp. 27-8.

27. A suggestion taken from the Wall Report.

28. See the 1973 U.S. Executive Order No. 11, 652 on classification: see Rankin, at p. 65.

29. Exemptions to Notices of Motion for the Production of Papers uses "would" for "security of the State" and "might" for international and federal-provincial relations.

30. At p. 18.

31. At p. 18.

32. Pub. L. 90-23, 81 Stat. 54, § 552(b)(1). See generally, Rankin, Chapter 2.

33. (1973) 410 U.S. 73.

34. 5 U.S.C. § 552 (b)(1) as amended by Pub. L. No. 93-502. There have been a large number of law review articles on this amendment: see, e.g., Comment, "Judicial Review of Classified Documents: Amendments to the Freedom of Information Act" (1975) 12 Harvard J. on Leg. 415;

Project, "Government Information and the Rights of Citizens" (1975) 73 Mich. L. Rev. 971; Clark, "Holding Government Accountable: the Amended Freedom of Information Act" (1975) 84 Yale L.J. 741; Note, "National Security and the Amended Freedom of Information Act" (1976) 85 Yale L.J. 401; Note, "Executive Privilege and the Freedom of Information Act: the Constitutional Foundation of the Amended National Security Exemption" [1976] Washington U.L.Q. 609.

35. See Rankin, at p. 54.

36. At p. 20.

37. At p. 16.

38. P. 18. See also statements by the then Secretary of State John Roberts in Hansard, June 22, 1978 at p. 6664 *et seq.*, and October 10, 1978 at p. 7056 *et seq.*

39. P. 18.

40. P. 20.

41. At p. 18.

42. See also K. Kernaghan, "Freedom of Information and Ministerial Responsibility" (September, 1978) at pp. 59 *et seq.* for a discussion of the review options.

43. Freedom of Information (1978, A. Lincoln, chairman).

44. See pp. 15-16, 18.

45. Freedom of Information in Canada: Will the Doors Stay Shut? (Ottawa, 1977).

46. See the Brief submitted to the Standing Joint Committee on Regulations and Other Statutory Instruments, appended to Committee Proceedings, Issue No. 19, April 4, 1978 at pp. 17-18. See also "Freedom of Information in Canada: A Model Bill" prepared by the C.B.A.'s Special Committee on Freedom of Information, March, 1979.

47. Hansard, June 22, 1978 at p. 6658.

48. Appended to Hansard, Senate Debates, June 30, 1978.

49. P. 1033, picking up the recommendation in the C.B.A. brief at p. 24, and the Rankin study at p. 149.

50. See Joint Committee Report at p. 1033.

51. See John Roberts, Hansard, June 22, 1978 at p. 6665.

Part Four: POLICE AND POWERS AND NATIONAL SECURITY

(notes to page 71 of text)

1. R.S.C. 1970, c. W-2.

2. See the Report of the Canadian Committee on Corrections (Ouimet Report), 1969, at 62.

3. See Kelly and Kelly, Policing in Canada (Toronto, 1976) at pp. 72 and 578-9.

4. A large number of members of the Security Service are "civilians" and not R.C.M.P. officers.

5. R.S.C. 1970, c. R-9, s. 17(3). All officers (defined by s. 6) are automatically peace officers and each has the power of a peace officer in every part of Canada: see Kelly and Kelly, Policing in Canada at p. 62. Members of the Force below the rank of officer must, insofar as the R.C.M.P. Act is concerned, be appointed by the Commissioner to be a peace officer.

6. Criminal Code, s. 2: " 'Peace officer' includes . . . (c) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace . . ."

7. See Robin Bourne's core paper on Incident Management and Jurisdictional Issues delivered to the ICCC Seminar on Research Strategies for the Study of International Political Terrorism, 1977.

8. Under the National Defence Act, R.S.C. 1970, c. N-4, s. 134.

9. S. 2.

10. Lord Denning's Report, September 1963, Cmnd. 2152, at p. 91. Compare C. H. Rolph, "The British Analogy" in Investigating the F.B.I. (P. Watters and S. Gillers, eds., New York, 1973) 389 at p. 401: "Since its members have no more power than that of an ordinary constable, they tend to resort even more than he does to extra-statutory ploys. Notable among these is the search of houses without a magistrate's warrant. . . ."

11. Lord Denning's Report, September, 1963, Cmnd. 2152, at p. 25, 91.

12. Report of the Royal Commission on Security (Abridged), June 1969, at paragraph 57: "A security service will inevitably be involved in actions that may contravene the spirit if not the letter of the law, and with clandestine and other activities which may sometimes seem to infringe on individuals' rights; these are not appropriate police functions."

13. Report of the Royal Commission on Security (Abridged), June 1969, at paras. 51-55.

14. See generally S. A. de Smith, Constitutional and Administrative Law (3d. ed., 1977) at pp. 113 *et seq.;* Maitland, The Constitutional History of England (1908); Keir and Lawson, Cases in Constitutional Law (5th ed., 1967); Wade and Phillips, Constitutional and Administrative Law (9th ed., 1977, A. W. Bradley ed.) pp. 231 *et seq;* and 8 C.E.D. (Ont. 3d) § 40.

15. Dicey, Law of the Constitution (10th ed., 1959) at 424.

16. *Attorney-General* v. *De Keyser's Royal Hotel, Limited,* [1920] A.C. 508 at 526.

17. See, e.g., *Chandler* v. *D.P.P.,* [1964] A.C. 763 (H.L.); *A.-G. Canada* v. *A.-G. Ontario* [1937] A.C. 326 (J.C.P.C.) (Labour Conventions case).

18. *Attorney-General* v. *De Keyser's Royal Hotel, Limited,* [1920] A.C. 508.

19. *Burmah Oil Co. Ltd.* v. *Lord Advocate* [1965] A.C. 75.

20. *A.-G. Canada* v. *A.-G. Ontario,* [1898] A.C. 247 (J.C.P.C.).

21. *Bonanza Creek Gold Mining Company, Limited* v. *The King,* [1916] A.C. 566 (J.C.P.C.).

22. David Williams' Report, "The Internal Protection of National Security" at 77.

23. See R. J. Sharpe, Habeas Corpus (Oxford, 1976) at p. 91.

24. In the United Kingdom, see *Knuller (Publishing, Printing and Promotions) Ltd.* v. *D.P.P.,* [1973] A.C. 435; in Canada, see the Criminal Code, s. 8 and *Frey* v. *Fedoruk and Stone,* [1950] S.C.R. 517.

25. *Attorney-General* v. *De Keyser's Royal Hotel, Limited,* [1920] A.C. 508 at 575. S. 16 of the Interpretation Act, R.S.C. 1970, c. I-23, which states that "No enactment . . . affects . . . Her Majesty's rights or prerogatives in any manner, except only as therein mentioned or referred to" does not appear to alter the proposition that inasmuch as the Crown is a party to every Act of Parliament, it must be taken to assent to any curtailment of the prerogative contained in the conditions of such an Act. See *Re Walter's Trucking Service Ltd., The Queen in Right of Alberta* v. *A.-G. Canada* (1964), 44 D.L.R. (2d) 267 (Alta. S.C.), affd. 50 D.L.R. (2d) 711 (Alta. C.A.). For an example of the operation of s. 16, see *Re Silver Bros. Ltd., A.-G. Quebec* v. *A.-G. Canada,* [1932] A.C. 514 (J.C.P.C.).

26. See Keir and Lawson, Cases in Constitutional Law (5th ed., 1967) at 306; de Smith, Constitutional and Administrative Law (3d ed., 1977) at pp. 113 *et seq.;* and E. C. S. Wade and G. G. Phillips, Constitutional and Administrative Law (9th ed., A. W. Bradley, ed., 1977) at pp. 231 *et seq.*

27. *Prohibitions del Roy* (1607), 12 Co. Rep. 63; 77 E.R. 1342: "And the Judges informed the King, that no King after the Conquest assumed to himself to give any judgment in any cause whatsoever, which concerned the administration of justice within this realm, but these were solely determined in the Courts of Justice" (77 E.R. at 1343).

28. *Case of Proclamations* (1611), 12 Co. Rep. 74; 77 E.R. 1352: "Also it was resolved, that the King hath no prerogative, but that which the law of the land allows him." (77 E.R. at 1354).

29. de Smith, Constitutional and Administrative Law (2nd ed., 1971) at p. 120; for a modern application of the illegality of the dispensing power see *Regina* v. *Catagas* (1977), 38 C.C.C. (2d) 296 (Man. C.A.).

30. (1765) 19 St. Tr. 1030, 2 Wils. K.B. 275, 95 E.R. 807. See also *Leach* v. *Three of the King's Messengers* (1765) 19 St. Tr. 1001.

31. 95 E.R. at 808.

32. 95 E.R. at 817-818. A more complete report can be found in the State Trials.

33. 95 E.R. at 818.

34. Report of the Committee of Privy Councillors Appointed to Inquire into the Interception of Communications, 18th September 1957, Cmnd. 283 (Birkett Report).

35. Para. 21.

36. S. 58(1) of the Post Office Act, 1953; see para. 33.

37. The Report of the New Zealand Chief Ombudsman, Sir Guy Powles, on the Security Intelligence Service (Wellington, 1976), stated that even with similar legislation there was no legal power to intercept letters or telephone communications in peacetime, except for the purpose of ensuring efficient and adequate postal facilities (at p. 58). For a critical analysis of this view, and a discussion of the Birkett Report, see G. Crowder, "The Security Intelligence Service Amendment Act 1977 and the State Power to Intercept Communications," (1978) 9 Vict. U. Well. L. Rev. 145.

38. Birkett Report, para. 38.

39. Para. 50.

40. The legality of telephone tapping by the Post Office at the request of the police was upheld in the recent case of *Malone* v. *Metropolitan Police Commissioner* [1979] 2 W.L.R. 700. Megarry, V.-C., found a statutory foundation for the practice in s. 80 of the Post Office (Reorganisation) Act of 1969, c. 48, which specifically refers to telecommunications, but stated that "telephone tapping is a subject which cries out for legislation."

41. (1765) 19 St. Tr. 1030, 2 Wils, K.B. 275, 95 E.R. 807. See Wade and Phillips, Constitutional and Administrative Law (London, 9th ed., 1977, A. W. Bradley, ed.) at pp. 528-9; H. Street, Freedom, the Individual and the Law (3d ed., 1972) at p. 40 *et seq.*

42. Birkett Report, para. 23: "Lord Camden declared that the practice of issuing general warrants was illegal and unconstitutional."

43. (1765), 19 St. Tr. 1030, 2 Wils. K. B. 275, 95 E.R. 807.

44. Birkett Report, para. 25.

45. R.S.C. 1970, c. P-14.

46. "Every person is guilty of an indictable offence who unlawfully opens . . . any mail bag, post letters, or other article of mail . . . ." S. 43, to the effect that "nothing is liable to demand, seizure or detention while in the course of post, except as provided in this Act . . .", appears to reinforce the conclusion that mail can be 'lawfully' opened only under the circumstances set out in the Act itself, that is, by a Board of Review under strict procedural requirements in the case of the use of mails for unlawful purposes (s. 7), by a Customs officer in the case of foreign mail suspected of containing anything subject to import duties, again under strict procedural requirements (s. 46), and by the Dead Letter Department in the case of undeliverable mail (ss. 44, 45).

47. de Smith, Constitutional and Administrative Law (3d ed., 1977) at p. 115.

48. Williams, Criminal Law, The General Part (2d ed., 1961) at p. 793.

49. Stephen, A History of the Criminal Law of England (1883), vol. II at pp. 61-62. See generally, Wade and Phillips, Constitutional and Administrative Law (9th ed., 1977, A. W. Bradley ed.) at pp. 299 *et seq.*

50. See *Walker* v. *Baird,* [1892] A.C. 491 (J.C.P.C.); *A.-G.* v. *Nissan* [1970] A.C. 179 (H.L.).

51. *Regina* v. *Ormerod* [1969] 4 C.C.C. 3 at p. 17, citing *Roncarelli* v. *Duplessis* [1959] S.C.R. 122.

52. See *R.* v. *Justices of Kent* (1889), 24 Q.B.D. 181; *Madras Electric Supply Co.* v. *Boarland,* [1955] A.C. 667 (H.L.); and, generally, C. McNairn, Governmental and Intergovernmental Immunity in Australia and Canada, (1977).

53. R.S.C. 1970, c. I-23.

54. Criminal Code, s. 2: ' "everyone," "person," "owner," and similar expressions include Her Majesty.

55. See *infra,* Superior Orders, for additional discussion of this concept.

56. [1949] O.R. 888.

57. [1972] 3 O.R. 783.

58. [1975] 2 S.C.R. 739.

59. See, e.g., A. Grant, "The Supreme Court of Canada and the Police: 1970-76," (1977-78) 20 Crim. L.Q. 152.

I. ARREST AND SEARCH (notes to pages 75-77 of text)

1. R.S.C. 1970, c. 0-3.

2. R.S.C. 1970, c. N-1.

3. An Act for Preventing Frauds, and Regulating Abuses in His Majesty's Customs, 1662, 13 & 14 Car. II, c. 11. See Parker, "The Extraordinary Power to Search and Seize and the Writ of Assistance", (1963) 1 U.B.C.L. Rev. 688; and Skinner, "Writ of Assistance", (1963) 21 U.T. Fac. L. Rev. 26. A similar use in the United States played a role in bringing about the American Revolution: see *United States* v. *United States District Court* (1972), 92 S.Ct. 2125 at 2142, *per* Douglas, J. (hereinafter cited as the *Keith* decision).

4. Customs Act, R.S.C. 1970, c. C-40; Excise Act, R.S.C. 1970, c. E-12; Food and Drugs Act, R.S.C. 1970, c. F-27; and Narcotic Control Act, R.S.C. 1970, c. N-1.

5. Customs Act, s. 139; Narcotic Control Act, s. 10(1)(a); compare, however, the Excise Act, s. 76, subs. (1) and (2), and the Food and Drugs Act, s. 37(4).

6. Assistant Commissioner Chisholm, RCMP Security Service: Surreptitious Entry Public Statement, July 25, 1978, p. 3. An attempt to find out about RCMP practices by the Commission of Inquiry into Invasion of Privacy (Sargent Commission) in 1967 in B.C. was blocked by the Minister of Justice who invoked the Official Secrets Act: see Beck, "Electronic Surveillance and the Administration of Justice," (1968) 46 Can. Bar Rev. 643 at 645.

7. Surreptitious Entry Public Statement at p. 3.

8. But see *Chandler* v. *D.P.P.* [1964] A.C. 763 (H.L.) for a case where an anti-nuclear demonstration was halted, and charges were laid, under the British equivalent of s. 3(1)(a) of the Official Secrets Act for "approach[ing] . . . any prohibited place" — in this instance an Air Force base.

9. At pp. 8-9.

10. FBI Director Hoover had ordered a similar ban in 1966: see James Q. Wilson, "Buggings, Break-Ins & the FBI," Commentary, June 1978, at p. 53.

11. There is a suggestion by Warren Allmand, then Solicitor General, that prior to the enactment of s. 16, wiretapping in security cases was already permitted by the Official Secrets Act — see Justice and Legal Affairs, June 12, 1973 (Issue No. 15) at p. 19: "this proposed Section 16 is narrower than the present interpretation of the Official Secrets Act, the policy now."

12. (1947), 89 C.C.C. 196.

13. See Cornfield, "The Right to Privacy in Canada" (1967), 25 U.T. Fac. L. Rev. 103 at 113.

14. The police were not actually going to listen to conversations but just wanted to know where the calls were going to and coming from; but the principle is the same, indeed stronger, in relation to listening to conversations: see Beck, "Electronic Surveillance and the Administration of Justice" (1968), 46 Can. B. Rev. 643 at 665.

15. 89 C.C.C. 196 at 200.

16. July 25, 1978, at p. 5.

17. See also the position taken by the U.S. government in *Keith,* described as follows (92 S.Ct. 2125 at 2137): "We are told further that these surveillances are directed primarily to the collecting and maintaining of intelligence with respect to subversive forces, and are not an attempt to gather evidence for specific criminal prosecutions."

18. See the Brief "Re: Wire Tapping" by the RCMP CIB Legal Section (referred to at p. 8 of the memorandum from Commissioner George B. McClellan to Mr. E. A. Driedger, Deputy Minister of Justice, dated 23 November 1965, shown in the Surreptitious Entry Brief, McDonald Commission Public Hearings, as Appendix 2-I; located 21 April 1978). The Brief states at p. 10 that the *Bell* case "does not rule out the possibility of obtaining a search warrant which can satisfy the provisions of Section 429 [now s. 443], but it is felt that the case does stand for the proposition that a search warrant will not lie in cases of indiscriminate tapping where we are merely acting on suspicion or for intelligence purposes."

II. SECTION 16 OF THE OFFICIAL SECRETS ACT (notes to page 78 of text)

1. An opposition amendment in Committee to entitle the Act the Interception of Private Communications Act was defeated only by the Chairman's deciding vote: Justice and Legal Affairs, Nov. 13, 1973 (Issue No. 29) at p. 5.

2. See the Transcript of the Prime Minister's Press Conference in Ottawa of December 9th, 1977, p 6: "until then the law was not clear." In 1968, Professor Stanley Beck pointed out that wiretapping contravened several provincial Telephone Acts, though he noted that in Ontario, there was technically no law that forbade it. He suggested, however, that wiretapping was "a general search of a kind never dreamt of by the Star Chamber" and forbidden by the common law as expressed in *Entick* v. *Carrington* (1765), 19 St. Tr. 1030, 95 E.R. 807: see Beck, "Electronic Surveillance and the Administration of Justice" (1968) 46 Can. B. Rev. 643 at 657. The Ouimet Committee noted in 1969 that "there is no adequate Canadian legislation at the present time to deal with the threat to privacy involved in wiretapping and electronic eavesdropping": Report of the Canadian Committee on Corrections (1969) at p. 82. The Act incorporating the Bell Telephone Company of Canada, Stat. Can. 1880, c. 67, in s. 25 made it an offence to "interfere with the working of the . . . telephone lines, or intercept any message transmitted thereon . . . ," but the Ouimet Committee (p. 82) thought that it was at least doubtful whether the legislation applied to wiretapping by law enforcement officers in the investigation of crime. See also *Re Copeland and Adamson et al.,* [1972] 3 O.R. 248 (Ont. H.C.). Entering a place to plant a bug would involve violation of the Trespass Acts. R. F. V. Heuston has written that if there was no trespass or other tort there could be no civil liability: Salmond on the Law of Torts (17th ed., Heuston, 1977) at 35; Heuston, Essays in Constitutional Law (2d ed. 1964) at 52. The American case law prior to *Berger* v. *New York* (1967), 388 U.S. 41, also held that there was no unconstitutionality involved in wiretapping if there was no physical invasion or trespass.

3. Ouimet Report (1969) at p. 82: "Wiretapping is presently used by police forces in the investigation of suspected criminal activities."

4. Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2520.

5. Ouimet Report, pp. 80-88.

6. Journals of the House of Commons, March 11, 1970 (No. 84) — vol. CXVI, pp. 553 *et seq.*

7. Bill C-6, first reading February 21, 1972.

8. Bill C-176, first reading April 13, 1973.

9. Bill C-83, first reading February 24, 1976.

10. Bill C-51, first reading April 20, 1977.

11. The gun control aspects of the legislation are discussed in Friedland, "Pressure Groups and the Development of the Criminal Law," in Reshaping the Criminal Law (P. R. Glazebrook, ed., 1978).

12. Report of the Royal Commission on Security, 1969, at p. 102 (Mackenzie Report).

13. Birkett Report (1957) at p. 32.

14. Ouimet Report (1969) at p. 83.

15. Mackenzie Report (1969) at p. 102.

16. The 1970 Report of the Justice and Legal Affairs Committee recommended that at the Federal level the responsible Minister would be the Attorney-General of Canada, and that in national security cases only, concurrent responsibility should be vested in the Prime Minister. No other differentiation was made. See H.C. Journals, vol. CXVI 553 at 563.

17. S. 178.23.

18. S. 178.23(2).

19. S. 16(2).

20. Code, s. 178.13(2)(e); but with further 60 day renewals.

21. Solicitor General's Annual Report, 1978, to the Governor-General as Required by Section 16(5) of the Official Secrets Act. In 1977, 471 warrants were issued, with an average length of 244.55 days.

22. Solicitor General's Annual Report, 1978, to the Governor-General as Required by the Criminal Code of Canada s. 178.22. These figures do not include 10 warrants granted under the emergency provision, s. 178.15, which last a maximum of 36 hours. In 1977, 605 warrants were issued, within an average length of 61.3 days. See also the Appendix to the opinion of Douglas, J. in the *Keith* decision, (1972) 92 S.Ct. 2125 at 2145, showing that in 1970 court-ordered devices were in use an average of 13.1 days whereas executive-ordered devices were in use between 71.7 and 200 days.

23. Security Service, Surreptitious Entry Public Statement, July 25, 1978, at p. 4.

24. See the evidence of General Dare, Justice and Legal Affairs, June 22, 1978, (Issue No. 40) at p. 20.

25. See the *Keith* case, 92 S.Ct. 2125 at 2140.

26. As required by section 16(5).

27. As required by section 178.22.

28. Bill C-6, s. 6 (February 21, 1972).

29. Justice and Legal Affairs, November 13, 1973 (Issue No. 29) at p. 4. The Minister of Justice had suggested an alternative which required the Solicitor General to keep the Prime Minister informed: p. 12.

30. Birkett Report (1957), p. 27.

31. C. H. Rolph, "The British Analogy" in Investigating the FBI (Watters and Gillers, ed., 1973) at 395.

32. Bunyan, The History and Practice of the Political Police in Britain (1977) at 201-2.

33. Bunyan, at 200. Note L. Leigh, Police Powers in England and Wales (1975) at 213: "Governmental interceptions of communications by letter, telephone and telegraph are subject to the safeguards imposed by a warrant procedure. The use of other electronic surveillance techniques such as the concealed microphone are not." He further quotes L. Hoffman ("Bugging the

Accused," The Listener, 23 June 1966) as follows (p. 218): "There is no reason to believe that the police ever tap telephones without a warrant, but if they did, there is little that the courts could do about it."

34. See the *Keith* decision, (1972), 92 S.Ct. 2125.

35. Bill C-6.

36. Under s. 178.12.

37. See the evidence of Solicitor General Blais, Justice and Legal Affairs, June 22, 1978 (Issue No. 40) at p. 25.

38. Letter to the Globe and Mail, October 4, 1977, set out, in part, in Justice and Legal Affairs, June 6, 1978, (Issue No. 35) at p. 10.

39. S. 178.15.

40. If the conduct in question was covered by the espionage sections of the O.S.A., then, as previously discussed, there are emergency powers in s. 11. With the passage of s. 16, though, wiretapping cannot be considered one of them. The one gap, therefore, is an emergency provision for espionage, assuming it does not fit within the treason section of the Code.

41. "Seizure" was not needed in the Code, of course, because of the search warrant section.

42. See Surreptitious Entry Public Statement at p. 4.

43. Mackenzie Report at 103.

44. R.S.C. 1970, c. P-14, s. 43. See the 1976 Annual Report under s. 16 of the Official Secrets Act which states: "One warrant authorizing the interception of Postal Communications was issued by the Solicitor General. It could not be executed due to the prohibitive effect of Section 43 of the Post Office Act."

45. S. 16(2).

46. See W. Kelly and N. Kelly, Policing in Canada (1976) at p. 510 *et seq.*

47. Bill C-6, s. 6 (adding s. 16(2) (b)).

48. The word "subversion" is also used in the Immigration Act, Stat. Can. 1976-77, c. 52 (see s. 19(1)(f), (g)) but is not defined there.

49. Bill C-6, s. 6, first reading February 21, 1972.

50. See, e.g., Justice and Legal Affairs, June 6, 1972 (Issue No. 8) at p. 41; and June 13, 1972 (Issue No. 11) at p. 28.

51. June 6, 1972 (Issue No. 8) at p. 41.

52. November 13, 1973 (Issue No. 29) at pp. 3,4.

53. S. 46.

54. It is so indexed in Martin's Annual Criminal Code (Greenspan ed., 1978).

55. The actions of French workers who threw their wooden shoes — "sabots" — into the machinery. See *supra,* Other Criminal Offences.

56. See the discussion *supra.*

57. Justice and Legal Affairs, November 13, 1973 (Issue No. 29) at pp. 4, 16-17.

58. S. 60(4).

59. June 13, 1972 (Issue No. 11) at p. 29.

60. November 13, 1973 (Issue No. 29) at p. 19.

61. See the section on Treason: Revolution and Secession, *supra.*

62. I say "obvious" only in retrospect, since the learned editor of Friedland, Cases and Materials on Criminal Law and Procedure (5th ed., 1978) set out (at pp. 84-86) fifteen questions relating to wiretapping, but does not raise the issue under discussion here. I am assured, however, that if there is a 6th edition, the issue will be prominently included.

63. Ouimet Report, at 81. See also p. 86: the judicial order "should specify in detail . . . the place or places and the facilities in respect of which the order is made."

64. (1967), 388 U.S. 41.

65. Justice and Legal Affairs, June 10, 1969, p. 1274.

66. Justice and Legal Affairs, May 27, 1969, pp. 1072-1073.

67. Justice and Legal Affairs, June 10, 1969, p. 1306.

68. See the Globe and Mail, April 14, 1978.

69. See the Globe and Mail, April 14, 1978.

70. The matter is specifically covered in the Foreign Intelligence Surveillance Act of 1978, Public Law 95-511, s. 104(8).

71. (1979) 99 S.Ct. 1682.

72. See McNamara, "The Problem of Surreptitious Entry to Effectuate Electronic Eavesdrops: How Do You Proceed After the Court Says 'Yes'?" (1977) 15 Am. Crim. L. Rev. 1; Cerretani, "Judicial Authorization of a Forcible and Surreptitious Break-In to Install Electronic Surveillance Equipment," (1977) 24 Wayne L. Rev. 135; Sternberg, "Covert Entry in Electronic Surveillance: The Fourth Amendment Requirements" (1978) 47 Ford. L. Rev. 203; and Comment, "The Illegality of Eavesdrop-Related Break-ins: *United States* v. *Finazzo* and *United States* v. *Santora*" (1979) 92 Harv. L. Rev. 919.

73. (1976) 541 F.2d 690 (C.A., 8th Cir.).

74. (1976) 424 F.Supp. 556 (Dist. Ct., Md.).

75. District Judge Blair stated at p. 560: "Necessarily concomitant to and envisioned in the court order, this court believes, was the covert installation of the recording devices."

76. (1977) 553 F.2d 146 (C.A., D. Col.).

77. 553 F.2d 146 at 152. See also *U.S.* v. *Finazzo* (1978) 583 F.2d 837 (C.A., 6th Cir.).

78. The majority opinion was delivered by Powell, J., concurred in by Burger, C. J., and White, Blackman and Rehnquist, JJ. Stevens and Marshall, JJ. dissented on all points; they wanted Congress to deal with the matter before the Courts ruled on its constitutionality. Stewart and Brennan JJ. agreed with the majority's constitutional argument. Stewart J. did not dissent from the majority opinion that Congress had impliedly authorized entries.

79. (1979) 99 S.Ct. 1682 at p. 1691.

80. (1979) 99 S.Ct. 1682 at p. 1698.

81. The first reported case on the point is *R.* v. *Dass* (1978) 3 C.R. (3d) 193 (Man.Q.B.); confirmed on appeal, as yet unreported.

82. See Hamilton J. in *Dass* (1978) 3 C.R. (3d) 193 at pp. 195-6: "If the authorized individuals were not entitled to intercept in a surreptitious manner, the purpose and intent of this part of the Criminal Code would be meaningless. Conversely then, the authorization granted to a party carries with it the right to do such things as are reasonably necessary and are not otherwise illegal to effect the purposes designated in the authorization. I conclude, therefore, that the interceptions in this case were lawfully made . . . ." The Manitoba Court of Appeal, in obiter remarks, disagreed with Hamilton, J. Huband J.A. stated for the Court: "the authorization order is not a fiat by the courts to violate the laws of the land. I see nothing in the *Criminal Code* which gives a judge the power to authorize or condone illegal entry." See also (1978) 3 Criminal Lawyers Association Newsletter 12.

83. R.S.C. 1970, c. I-23, s. 26(2).

84. Stat. Can. 1976-77, c. 53, ss. 8(1), 9(2).

85. Code, s. 178.12(e).

86. Code, s. 178.13(2)(c).

87. They are now more in line with the U.S. provisions: see 18 U.S.C. § 2518 (4)(b).

88. P. 4.

89. *Dalia* v. *U.S.* (1979) 99 S.Ct. 1682 does not deal with Executive authorized bugging, but the judgment is wide enough to cover it: "The Fourth Amendment does not prohibit *per se* a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment" (p. 1689).

III. U.S. LAW: SEARCH AND SEIZURE IN CASES OF NATIONAL SECURITY
(notes to pages 88-89 of text)

1. Final Report of the Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities (Washington, 1976), *passim.*

2. See the Final Report of the U.S. Senate Select Committee on Presidential Campaign Activities, June 1974, at pp. 3 *et seq.*: "The Background of Watergate"; Report of the Watergate Special Prosecution Force, October 1975, at pp. 143 *et seq.* "Control of the Intelligence and National Security Functions." See also, James Q. Wilson, "Buggings, Break-ins & the FBI," Commentary, June 1978 at p. 52.

3. *Ibid.* at p. 52.

4. (1972), 92 S.Ct. 2125. The case involved electronic surveillance, but would be applicable as well to physical probes. With respect to electronic surveillance it was not until *Berger* v. *New York* (1967), 388 U.S. 41, that the Supreme Court held that wiretapping came within the search and seizure protection of the 4th Amendment regardless of whether it was accompanied by physical invasion or trespass, and thus required, *inter alia,* prior judicial authorisation. The complex history of the use of electronic surveillance in the U.S. will not be attempted here; Navasky and Lewin's paper, "Electronic Surveillance" in Investigating the FBI (Watters and Gillers, eds., 1973) 297 concludes at p. 330 that "the history of electronic surveillance . . . is a history of deception, confusion, ambivalence and after-the-fact rationalisation . . . ."

5. At p. 2133.

6. 92 S.Ct. 2125 at 2139.

7. See generally Wilson, "Buggings, Break-ins & the FBI," Commentary, June 1978, at p. 52. Another recent prosecution which may also do so is the espionage case concerning a United States Information Agency officer, Humphrey, and a Vietnamese ex-patriate, Truong, which contains warrantless electronic surveillance evidence: see The New York Times, April 16, 1978. See also *Truong Dinh Hung* v. *U.S.* (1978) 99 S.Ct. 16 (application for bail).

8. 92 S.Ct. 2125 at 2132.

9. 92 S.Ct. 2125 at 2139.

10. 18 U.S.C. §§ 2510-2520. Much of the legislation was passed in response to, and according to the conditions laid down in, *Berger* v. *New York* (1967), 388 U.S. 41.

11. 18 U.S.C. § 2511(3).

12. See, e.g., *United States* v. *Butenko* (1974) 494 F.2d 593 (C.A. Third Cir.) (holding that a warrant is not necessary for the purpose of gathering foreign intelligence information, but that the surveillance must be reasonable); *Zweibon* v. *Mitchell* (1975) 516 F.2d 594 (C.A. Dist. Col. Cir.) (judicial authorisation required in all cases except emergencies); *United States* v. *Ehrlichman* (1976) 546 F.2d 910 (C.A. Dist. Col. Cir.); and *United States* v. *Barker* (1976) 546 F.2d 940 (C.A.

Dist. Col. Cir.). See also M. G. Paulsen, The Problems of Electronic Eavesdropping (A.L.I./A.B.A., 1977), ch. 5: "The Special Case of Eavesdropping in National Security Matters"; Puzder, "The Fourth Amendment and Executive Authorization of Warrantless Foreign Security Surveillance" [1978] Wash. L.Q. 397; Note, "U.S. v. Butenko: Executive Authority to Conduct Warrantless Wiretaps for Foreign Security Purposes," (1976) 27 Hastings L. J. 705; Locovara, "Presidential Power to Gather Intelligence: the Tension between Article II and Amendment IV" (1976) 40 Law and Contemporary Problems 106; Note, "Foreign Security Surveillance and the Fourth Amendment," (1974) 87 Harv. L. Rev. 976; Nesson, "Aspects of the Executive's Power over National Security Matters: Secrecy Classifications and Foreign Intelligence Wiretaps," (1974) 49 Indiana L.J. 399; Note, "Developments in the Law: The National Security Interest and Civil Liberties" (1972) 85 Harv. L. Rev. 1130. The Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance (1976) (N.W.C. Report) did not undertake a study of electronic surveillance for national security cases (see pp. 27-8); but the subject is addressed in the minority reports.

13. § 1561(2)(a). S. 1, a proposed Report of the Senate Committee on the Judiciary (94th Congress), and the Report of the Judiciary Committee's Subcommittee on Criminal Laws and Procedure did deal with procedure and therefore with wiretapping and were (not surprisingly) more permissive than the existing law: see Schwartz, "Reform of the Federal Criminal Laws: Issues, Tactics and Prospects," [1977] Duke L. J. 171 at 207.

14. October, 1975, at p. 145.

15. Book II, pp. 289 *et seq.* The Report had recommended (at p. 327) that "All non-consensual electronic surveillance, mail-opening, and unauthorized entries should be conducted only upon authority of a judicial warrant."

16. Note the earlier proposed Foreign Intelligence Surveillance Act of 1976 (S. 3197) as introduced by Senator Edward Kennedy, in M. G. Paulsen, The Problems of Electronic Eavesdropping, (A.L.I./A.B.A., 1977) at 118.

17. New York Times, May 20, 1979.

18. Public Law 95-511.

19. S. 102.

20. S. 103.

21. S. 104.

IV. OPENING MAIL (notes to pages 90-91 of text)

1. Report from the Secret Committee on the Post Office (House of Commons, 1844) at 95.

2. See the Post Office (Revenue) Act of 1710, 9 Anne, c. 10, s. 40; the Post Office (Offences) Act of 1837, 1 Vict., c. 36, s. 25; the Post Office Act of 1908, 8 Edw. 7, c. 48, s. 56; and the Post Office Act of 1953, 1 & 2 Eliz. 2, c. 36, s. 58.

3. Report from the Secret Committee of the House of Lords relative to the Post Office (House of Commons, 1844) at 1; see the Birkett Report, 1957, at p. 8.

4. Paul S. Fritz, The English Ministers and Jacobitism between the Rebellions of 1715 and 1745 (Toronto, 1975).

5. *Ibid.* at pp. 51-53, and 109 *et seq.*

6. 1 Vict., c. 36, s. 25.

7. Birkett Report, 1957, p. 7; see also D. Williams, Not in the Public Interest (1965) at 132.

8. Appointed "to inquire into the State of Law in respect to the detaining and opening of letters at the General Post Office, and into the Mode under which the Authority given for such detaining and opening has been exercised, and to Report their opinions and observations thereupon to the House." See the Commons Report, at 2.

9. This committee was given the same appointment as the Commons committee, *supra,* with the addition that to this committee "was referred the Petition of *Joseph Mazzini,* of 47, Devonshire-street, Queen-square, complaining of his letters having been detained and opened at the Post-office, and praying for Inquiry." See the Lords Report, *supra,* at 1.

10. Report from the Secret Committee of the House of Lords (1844) at 2.

11. An Act for enabling Colonial Legislatures to establish Inland Posts, 1849, 12 & 13 Vict., c. 66.

12. See the Act to make provision for the Management of the Post-Office Department whenever it shall be transferred to the Provincial Government, 1849 (Prov. of Canada), 12 Vict., c. 34; and the Act to provide for the transfer of the management of the Inland Posts to the Provincial Government, and for the regulation of the said Department, 1850 (Prov. of Canada), 13 & 14 Vict., c. 17.

13. The Act for the regulation of the Postal Service, 1867 (Dom. of Canada), 31 Vict., c. 10. See generally, for a history of the Post Office in Canada, W. Smith, The History of the Post Office in British North America 1639-1870, (Cambridge, 1920).

14. Report from the Secret Committee (Commons) at 14.

15. (1920), at p. 214.

16. My italics. Prov. of Canada, 13 & 14 Vict., c. 17, s. 16. Compare the New Brunswick Act, R.S.N.B. 1855, c. 40, s. 33, which was an exact copy of the English section except for its omission of the proviso concerning the warrant of the Secretary of State. This may not conclusively demonstrate the abandonment of mail opening because the section made it an offence only if one acted "contrary to his duty." However, it is likely that, as with the English section, the circumstances when such an act would not be contrary to one's duty were detailed in the proviso to s. 33.

17. R.S.C. 1970, c. P-14.

18. But note s. 39 of the 1867 Act, 31 Vict., c. 10, which stated: ". . . nor shall any letter or packet . . . be liable to demand, seizure, or detention, whilst in the Post Office, or in the custody of any person employed in the Canada Post Office, — under legal process against the sender thereof, or against the party or legal representatives of the party to whom it may be addressed." There was no similar provision in the 1850 Province of Canada Act, 13 & 14 Vict., c. 17, or the 1859 Province of Canada Act, 22 Vict., c. 31. The current Post Office Act, R.S.C. 1970, c. P-14, states somewhat more widely in s. 43 that "Notwithstanding anything in any other Act or law, nothing is liable to demand, seizure or detention while in the course of post, except as provided in this Act or the regulations." This is certainly an indication that the power no longer exists.

19. H.C. Debates, June 27, 1950 at 4212.

20. Note also R.S.C. 1970, c. P-14, s. 7 relating to prohibitory orders for the unlawful use of mails and s. 46(2) permitting a customs inspector to open international letters in the presence of the addressee, and other international mail without the addressee being present. It should be noted that s. 17(4) of the R.C.M.P. Act gives every R.C.M.P. officer "all the rights, privileges and immunities of a customs and excise officer . . . ." U.S. law allows customs officers wider powers. They can open mail without a warrant for customs purposes and this power has recently been upheld by the U.S. Supreme Court in *United States* v. *Ramsey* (1977) 97 S.Ct. 1972. This only applies to international mail; domestic mail is subject to the probable cause and warrant requirements of the fourth amendment: see *Ex parte Jackson* (1877) 96 U.S. 727 at 733. See generally, Mark, "Border Searches of International Letter Mail," (1977) 49 Colorado L. Rev. 103; Hillenbrand, "The Customs Authority to Search Foreign Mail," (1973) 6 N.Y.U.J. of Int'l L. & Pol. 91.

21. Note, however, that Morris Manning states in his monograph, The Protection of Privacy Act, Bill C-176 (1974) at p. 78 that section 16 "allows the Solicitor General to issue a warrant for the purpose of intruding in the conversations or mail of anyone in or out of the government."

22. Justice and Legal Affairs, June 22, 1978 (Issue No. 40) at 11.

23. Bill C-26, 1st reading, February 7, 1978; 2d reading, March 20, 1978. Quebec has taken the position that the legislation is constitutionally invalid: see the correspondence set out in Justice and Legal Affairs, June 7, 1978 (Issue No. 36), Appendix "JLA-29".

24. H.C. Debates, March 14, 1978 at 3767.

25. See Justice and Legal Affairs (Issue No. 38), June 13, 1978 at 5.

26. Final Report of the Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities (Washington, 1976), Book I, p. 165, Book II, pp. 315-16, Book III, pp. 559-677.

27. s 2-205, January 24, 1978.

28. See the Mackenzie Report, 1969, p. 103.

29. See N. Kelly and W. Kelly, The Royal Canadian Mounted Police (1973) at pp. 268 *et seq.* For a discussion of the importance of opening mail in wartime, see W. Stevenson, A Man Called Intrepid (1976).

V. INFORMANTS AND ENTRAPMENT (notes to pages 93-94 of text)

1. Mackenzie Report (1969), para. 288.

2. *Id.*

3. *Id.*

4. *R.* v. *Buck* (1932) 57 C.C.C. 290 (Ont. C.A.).

5. Mackenzie, "Section 98, Criminal Code and Freedom of Expression in Canada", (1972) 1 Queen's L.J. 469 at 475.

6. W. Kelly & N. Kelly, Policing in Canada (1976) at 581.

7. Marx, "Thoughts on a Neglected Category of Social Movement Participant: The Agent Provocateur and the Informant," (1973) 80 Am. J. Sociol. 402, 404-5.

8. See, e.g., *Marks* v. *Beyfus* (1890) 25 Q.B.D. 494 (C.A.); *D.* v. *N.S.P.C.C.* [1977] 2 W.L.R. 201 (H.L.); *Re Inquiry into the Confidentiality of Health Records* (1978) 90 D.L.R. (3d) 576 (Ont. Div. Ct.) — appeal has been heard by the Ontario Court of Appeal, and judgment has been reserved. In *re United States; Socialist Workers Party* v. *Attorney General* (1977) 565 F.2d (C.A. 2nd Cir.). For centuries the criminal law relied on the paid informer rather than on police and prosecutors: see T. Bunyan, The History and Practice of the Political Police in Britain (1977) at 219.

9. *Kirzner* v. *The Queen* (1977) 38 C.C.C. (2d) 131 at 136.

10. *Mealey and Sheridan* v. *The Queen* (1974) 60 Crim. App. R. 59 at 61. For a discussion of the background to this case and the role of the police informer see Geoff Robertson, Reluctant Judas: the Life and Death of the Special Branch Informer, Kenneth Lennon (London, 1976).

11. 60 Crim. App. R. 59 at 62.

12. 38 C.C.C. (2d) 131 at 136.

13. See Donnelly, "Judicial Control of Informants, Spies, Stool Pigeons and Agent Provocateur" (1951) 60 Yale L.J. 1091; Sneideman, "A Judicial Test for Entrapment: The Glimmerings of a Canadian Policy on Police-Instigated Crime" (1973) 16 Crim. L.Q. 81; Heydon, "The Problems of Entrapment" [1973] Camb. L.J. 268; Smith, "The Law Commission Working Paper No. 55 on Codification of the Criminal Law, Defences of General Application: Official Instigation and Entrapment" [1975] Crim. L. Rev. 12; G. Williams, Criminal Law (2d ed. 1961) at pp. 782 *et seq.;* Ranney, "The Entrapment Defense — What Hath the Model Penal Code Wrought?" (1977-78) 16 Duquesne L. Rev. 157; Dunham, *"Hampton* v. *United States:* Last Rites for the 'Objective' Theory of Entrapment?" (1977) 9 Colum. Human Rights L. Rev. 223; Park, "The Entrapment Controversy" (1976) 60 Minn. L. Rev. 163; and the (English) Law Commission, Criminal Law, Report on Defences of General Application, 28th July, 1977.

14. Home Office Consolidated Circular to the Police on Crime and Kindred Matters. See the Eng. Law Commission, Criminal Law, Report on Defences of General Application, 28th July 1977, at p. 49 and Appendix 4. See also the Royal Commission on Police Powers of 1928 (Cmd. 3297) at p. 116: "Where participation is essential it should only be resorted to on the express and written authority of the Chief Constable", cited in Smith and Hogan, Criminal Law (4th ed., 1978) at p. 139.

15. *Mealey and Sheridan* v. *The Queen* (1974) 60 Crim. App. R. 59; *R.* v. *Sang* [1979] 2 W.L.R. 439 (C.A.); see also the Report on Defences of General Application, 1977, at p. 41.

16. *Lemieux* v. *The Queen* [1968] 1 C.C.C. 187 at 190.

17. *Kirzner* v. *The Queen* (1977) 38 C.C.C. (2d) 131.

18. (1977) 32 C.C.C. (2d) 76.

19. Spence, Dickson and Estey, JJ.

20. 38 C.C.C. (2d) 131 at 141.

21. *Id.;* if the case of *Rourke* v. *The Queen* (1977) 35 C.C.C. (2d) 129 (S.C.C.) can be overcome. See *R.* v. *Shipley* [1970] 3 C.C.C. 398 (Ont. Cty. Ct.), for the type of case which might well result in a reversal of *Rourke* and a stay by the Supreme Court. The Courts are not likely to exclude the informer's evidence until the *Wray* case, which deprives the courts of the discretion to exclude illegally obtained evidence, is reversed: *The Queen* v. *Wray* [1970] 4 C.C.C. 1 (S.C.C.). The *Wray* principle was adopted, although not cited, by the English Court of Appeal in *R.* v. *Sang* [1979] 2 W.L.R. 439, leave to appeal to the House of Lords granted on February 15, 1979.

22. Report of the Canadian Committee on Corrections (1969) at pp. 75 *et seq.*

23. *Ibid.,* at p. 76.

24. Report on Defences of General Application, 1977, at p. 51.

25. *Id.*

26. See *Haughton* v. *Smith* [1975] A.C. 476, and *Booth* v. *State of Oklahoma* (1964) 398 P.2d 863 (C.C.A., Okla.).

27. See *Lemieux* v. *The Queen* [1968] 1 C.C.C. 187.

28. *Rex* v. *Snyder* (1915) 24 C.C.C. 101 (Ont. C.A.).

29. See s. 24 of the Criminal Code; see also *R.* v. *Scott* [1964] 2 C.C.C. 257 (Alta. C.A.).

30. See *Sorrells* v. *United States* (1932) 287 U.S. 435; *Sherman* v. *United States* (1957) 356 U.S. 369; *United States* v. *Russell* (1973) 411 U.S. 423; and *Hampton* v. *United States* (1976) 96 S.Ct. 1646.

31. See cases cited in the previous note.

32. See The American Law Institute's Model Penal Code, 1962, s. 2.13(1); the National Commission on Reform of Federal Criminal Laws: Study Draft of a new Federal Criminal Code, 1970, s. 702, and that Commission's Working Papers (1970), pp. 303-328. The proposed Report of the Senate Committee on the Judiciary (S. 1), 1973, however, reverted to the subjective approach: see Schwartz, "Reform of the Federal Criminal Laws: Issues, Tactics and Prospects," [1977] Duke L.J. 171 at 208. The Criminal Code Reform Act of 1977, which has passed the Senate but not the House, leaves the defence of unlawful entrapment (along with other defences) to "be determined by the courts of the United States according to the principles of the common law as they may be interpreted in the light of reason and experience." See also the Report of the Senate Committee on the Judiciary to Accompany S. 1437 (1977) at pp. 109 *et seq.*

33. 38 C.C.C. (2d) 131 at 134; see also *R.* v. *Ormerod* [1969] 4 C.C.C. 3 (Ont. C.A.); *Brannan* v. *Peek* [1948] 1 K.B. 68 (Div. Ct.); *R.* v. *Sang* [1979] 2 W.L.R. 439 (C.A.); and the Report on Defences of General Application, 1977, at p. 50.

34. See the Report of the Canadian Committee on Corrections (1969) at p. 78. The problem has been handled legislatively in New Brunswick with respect to violations of Provincial law by s. 3(4)

of the New Brunswick Police Act, S.N.B. 1977, c. P-9.2: "A member of the Royal Canadian Mounted Police or a member of a police force shall not be convicted of a violation of any Provincial statute if it is made to appear to the judge before whom the complaint is heard that the person charged with the offence committed the offence for the purpose of obtaining evidence or in carrying out his lawful duties."

35. See Glanville Williams, Textbook of Criminal Law (London, 1978) at pp. 310 and 566; Smith and Hogan, Criminal Law (4th ed., 1978) at pp. 138-40.

36. The cases dealing with an accomplice warning in the case of an informer deal with a somewhat different question.

37. See the Final Report of the Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities (1976), Book II at pp. 185-6, 318 *et seq.;* Book III at p. 225 *et seq.* See also Donner, "Political Informers" in Investigating the F.B.I. (P. Watters and S. Gillers, eds., 1973) pp. 338 *et seq.*

38. See the New York Times, July 23, 1978.

39. The White House; Executive Order, January 24, 1978: United States Intelligence Activities, s. 2-207. See also the Guidelines on Use of Informants Issued by Attorney-General Edward H. Levi to F.B.I. Director Clarence M. Kelley, December 15, 1976.

40. As reported in the New York Times, May 20, 1979. The quotations in the text are from the New York Times.

VI. SOME POSSIBLE DEFENCES (notes to pages 97-98 of text)

1. As previously discussed, surreptitious entry to plant a bug when there is a warrant raises different problems and will not necessarily be determined by the answer to this question.

2. (1765) 19 St. Tr. 1030 at 1066. See generally Salmond on the Law of Torts (17th ed. Heuston, 1977) at 38.

3. Salmond on the Law of Torts (17th ed. Heuston, 1977) at 38.

4. See *United States* v. *Ehrlichman* (1976) 546 F.2d 910 (C.A., Dist. Col.); and *United States* v. *Barker* (1976) 546 F.2d 940 (C.A., Dist. Col.). Note also the current prosecution of L. Patrick Gray, former director of the FBI, and other senior FBI persons.

5. *Cf.* the letter to the editor by Toronto criminal lawyer Walter Fox, Globe and Mail, April 29, 1978, which ingeniously suggests the possibility of combining s. 115 of the Code and the Canadian Bill of Rights, Stat. Can. 1960 c. 44. The Bill of Rights recognizes in s. 1(a) "the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law." S. 115 of the Code provides that when no penalty is otherwise provided — and there is none in the Bill of Rights — every one is guilty of an offence "who, without lawful excuse, contravenes an Act of the Parliament of Canada by wilfully doing anything that it forbids . . . ." Section 115 has been considered as a possible basis of criminal liability where there has been an improper search without a warrant: see the Report, dated December 11, 1978, by the Deputy A.-G. of B.C., R. H. Vogel: "Surreptitious Entries of the Royal Canadian Mounted Police in British Columbia (1972-1976)."

6. See *Frey* v. *Fedoruk and Stone* [1950] S.C.R. 517; see also *Curr* v. *The Queen* [1972] S.C.R. 889 on "due process of law."

7. See, e.g., *R.* v. *Gibson* [1976] 6 W.W.R. 484 (Sask. D.C.); *cf. R.* v. *Massue* [1966] 3 C.C.C. 9 (Quebec C.A.).

8. S. 283: "to deprive, temporarily or absolutely."

9. See, e.g., *R.* v. *Arnoldi* (1893) 23 O.R. 201.

10. In *R.* v. *Andsten and Petrie* (1960) 128 C.C.C. 311, the B.C. Court of Appeal upheld a conviction of agents of a private investigator retained to investigate a spouse's conduct. Davey, J.A., stated at p. 318: "I agree with the learned trial Judge that 'hanging around" well expresses what is meant by 'loiters' as used in [the section]." The offence is a summary conviction offence with a six month limitation period, but would be relevant in a discussion of conspiracy.

11. The Petty Trespass Act, R.S.O. 1970, c. 347.

12. S. 4.

13. The Ontario Summary Convictions Act, R.S.O. 1970, c. 450.

14. [1963] 3 C.C.C. 201.

15. R.S.O. 1950, c. 279; now R.S.O. 1970, c. 351.

16. The B.C. Court of Appeal did so in *R.* v. *Layton; Ex parte Thodas,* [1970] 5 C.C.C. 260, for a charge of conspiracy under the B.C. Securities Act. But as the Court (Nemetz, J. A., dissenting in part) pointed out at p. 277, "that violations [of the Act] are not considered of a minor nature is shown from the maximum penalties provided, i.e., in the case of directors and officers of companies imprisonment for one year or a fine of $2,000 or both, and in the case of companies a fine of $25,000. See also *R.* v. *Jean Talon Fashion Center Inc.,* (1975) 22 C.C.C. (2d) 223, where the accused sought a writ of prohibition on the basis that a charge of conspiring to effect an unlawful purpose by demolishing certain buildings in Montreal without a permit under a municipal by-law did not disclose an offence known to the law. Rothman, J., held that prohibition was not the proper remedy, but went on to say (at p. 235) that he was "satisfied that the demolitions referred to in the information in this case, *prima facie,* constitute an unlawful purpose within the meaning of s. 423(2) of the Criminal Code." See also *R.* v. *Celebrity Enterprises Ltd. (No. 2)* (1977) 42 C.C.C. (2d) 478 (B.C.C.A.); and *Re R.* v. *Gralewicz* (1978) 42 C.C.C. (2d) 153 (Ont. H. Ct.).

17. See, e.g., *Shaw* v. *D.P.P.* [1962] A.C. 220, and *Knuller Ltd.* v. *D.P.P.* [1973] A.C. 435.

18. See *Kamara* v. *D.P.P.* [1974] A.C. 104. It should be pointed out that trespass, *per se*, was not then an offence in England as it is in Canada, but was actionable solely in tort. See now the Criminal Law Act 1977, eliminating the common law offence of conspiracy to trespass and imposing liability in *some* specific cases of trespass (as well as conspiracy to breach those provisions): see Smith, "Conspiracy under the Criminal Law Act 1977 (2)" [1977] Crim. L. Rev. 638 at p. 643; Smith and Hogan, Criminal Law (4th ed., London, 1978) at p. 771. Entering a house surreptitiously in order to "bug" it is not, according to Glanville Williams, an offence: see Textbook of Criminal Law (London, 1978) at p. 894. See also *D.P.P.* v. *Withers* [1975] A.C. 842, where a charge of conspiracy to effect a public mischief was overturned as not disclosing an offence known to the law. The House of Lords held that it had to be considered whether the objects or means of the conspiracy were in substance of such a quality or kind as had already been recognized by the law as criminal.

19. R.S.C. 1970, c. W-2. See also the discussion on martial law in the Emergency Powers section.

20. *Morgentaler* v. *The Queen* (1975) 20 C.C.C. (2d) 449; Dickson, J., for the majority, did not, in fact, accept the defence; he assumed at p. 499 "the theoretical possibility of such a defence" and then held that on the facts it did not apply. Laskin, C.J.C., with whom Judson and Spence, JJ., concurred, did accept the defence, as, it would seem, did Pigeon J., speaking for Martland, Ritchie, Beetz and de Grandpré, JJ. The defence has been accepted by a number of trial judges, including O Hearn, Co.Ct.J., in *R.* v. *Kennedy* (1972) 7 C.C.C. (2d) 42 (N.S.), and Ward, Prov. J., in *R.* v. *Pootlass et al.* (1978) 1 C.R. (3d) 378 (B.C.). Although the defence was accepted by the English Law Commission's Working Party in Working Paper No. 55 (1974), it was rejected in the Law Commission Report (No. 83) on Defences of General Application (1977). Which recommendation will be adopted by Parliament is not clear. See the article by a member of the Working Party: Glanville Williams, "Defences of General Applications, The Law Commission's Report No. 83: (2) Necessity," [1978] Crim. L. R. 128.

21. 20 C.C.C. (2d) 449 at 497.

22. See the Law Commission, Working Paper No. 55 at p. 38; American Law Institute, Model Penal Code (1962), s. 3.02.

23. (1779) 21 St. Tr. 1045; see P. Glazebrook, "The Necessity Plea in English Criminal Law," [1972A] Camb. L.J. 87 at 108-9.

24. 21 St. Tr. 1045 at 1225.

25. Crim. No. 2685, Cochise County, Arizona, September 13, 1919; reported in Comment, "The Law of Necessity as Applied in the Bisbee Deportation Case," (1961) 3 Ariz. L. Rev. 264; see also Arnolds and Garland, "The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil," (1974) 65 J. of Crim. L. & Criminology 289 at 292-4.

26. *Buckoke* v. *G.L.C.* [1971] 2 W.L.R. 760; see also *Southwark L.B.C.* v. *Williams* [1971] 1 Ch. 734 (C.A.). There is now a regulation in England to cover this case: see Glanville Williams, Textbook of Criminal Law (1978) at p. 564.

27. *Johnson* v. *Phillips* [1976] 1 W.L.R. 65. *Cf. Wood* v. *Richards* [1977] Crim. L. Rev. 295 (Div. Ct.). See Fisher, "Driving in Emergency Situations" (1979) 143 J.P. 58.

28. In Canada, some of these situations are specifically covered by legislation. See, e.g., the Motor Vehicle Act, R.S.B.C. 1960, c. 253, s. 123 (as amended) which permits the driver of an "emergency vehicle," under certain conditions, to exceed the speed limit, proceed through a red light or stop sign without stopping, disregard directional traffic rules and signals, and stop or stand. The Highway Traffic Act, R.S.O. 1970, c. 202, s. 82(9) permits fire or police vehicles to exceed the speed limit, but no exceptions are made in s. 96 dealing with "signal-light traffic control systems." See *Coderre* v. *Ethier* (1978) 85 D.L.R. (3d) 621 (Ont. H.Ct.). Amendments to the Ontario Highway Traffic Act have recently been introduced which would permit emergency vehicles to cross intersections against red lights: see the Globe and Mail, May 16, 1979.

29. See, e.g., the memorandum from G. L. Jennings, Assistant-Commissioner, to the officer commanding C-D-E-F-H-K Division, R.C.M. Police, dated March 18th, 1936, in the Surreptitious Entry for Purpose of Criminal Investigation (Public Hearing) documents.

30. *People* v. *Defore* (1926) 150 N.E. 585 (N.Y.C.A.) *per* Cardozo J. at p. 587.

31. [1934] 2 K.B. 164.

32. Horridge, J., stated at p. 173: "It therefore seems to me that the interests of the State must excuse the seizure of documents, which seizure would otherwise be unlawful, if it appears in fact that such documents were evidence of a crime committed by any one . . . . In my opinion the seizure of these exhibits was justified, because they were capable of being and were used as evidence in this trial." See also the obiter statements in the case of *Pringle* v. *Bremner & Stirling* [1867] Scot. L. Reporter 18 (H.L.(S.)).

33. See, e.g., E. C. S. Wade, "Police Search," (1934) 50 L.Q.R. 354.

34. See *per* Lord Denning, M. R., in *Chic Fashions (West Wales) Ltd.* v. *Jones* [1968] 1 All E.R. 229, at 236, 308, and in *Ghani* v. *Jones* [1969] 3 All E.R. 1700, at 1703. On these cases, see L. Leigh, Police Powers in England and Wales (1975) at pp. 183 *et seq.*

35. [1969] 3 All E.R. 1700 at 1705.

36. Note also that in *Elias* v. *Pasmore,* [1934] 2 K.B. 164, there was in fact a valid warrant of arrest. There is no question that Horridge, J., would have held the search invalid if there was no right to arrest in the case. So it is a much narrower decision than might at first appear.

37. (1974) 19 C.C.C. (2d) 129.

38. *Id.*

39. Laskin, C.J.C., Judson and Spence, JJ. (1974) 19 C.C.C. (2d) 129 at p. 131. See also *R.* v. *Berrie* (1975) 24 C.C.C. (2d) 66 (B.C. Prov. Ct.).

40. R.S.C. 1970, c. I-23.

41. See the Report (No. 1) of the Royal Commission Inquiry into Civil Rights (McRuer Report), 1968, volume 1 at p. 411.

42. See the Globe and Mail, April 27, 1978.

43. See Smith and Hogan, Criminal Law (4th ed., 1978) at 182; Glanville Williams, Criminal Law (2d ed., 1961), pp. 140 *et seq.*

44. See the suspension of licence cases: e.g., *Prue and Baril* (1978) 38 C.C.C. (2d) 141 (B.C.C.A.), appeal to Supreme Court of Canada dismissed April 24, 1979.

45. *R.* v. *Howson* [1966] 3 C.C.C. 348 (Ont. C.A.); *cf. R.* v. *Shymkowich* (1954) 110 C.C.C. 97 (S.C.C.).

46. *R. ex rel. Irwin* v. *Dalley* (1957) 118 C.C.C. 116 (Ont. C.A.). *Cf.* Williams, Criminal Law, (2d ed. 1961) at pp. 320-1.

47. S. 173, trespassing at night; s. 307, being unlawfully in a dwelling-house; and s. 309, possession of housebreaking instruments. See Dickey, "Being on Premises 'Without Lawful Excuse' — A Study in Judicial Interpretation" (1973) 47 Australian L.J. 382; Card, "Authority and Excuse as Defences to Crime" [1969] Crim. L. Rev. 359. For a discussion of the word "wilfully," used in, for example, s. 387, see Williams, Criminal Law (2d ed. 1961) at 317-20.

48. *La Reine* v. *Marché de Québec Inc. et Bégin* [1969] 1 Ex. C.R. 3; *cf. R.* v. *Gibson* [1976] 6 W.W.R. 484 (Sask D.C.) and *R.* v. *Andsten and Petrie* (1960) 128 C.C.C. 311 (B.C.C.A.).

49. *Cambridgeshire and Isle of Ely C.C.* v. *Rust* [1972] 2 Q.B. 426; see *Dickens* v. *Gill* [1896] 2. Q.B. 310 (Q.B.D.); *cf. Harvey* (1871) L.R. 1 C.C.R. 284.

50. [1972] 2 Q.B. 426 at 434.

51. *R.* v. *Shymkowich* (1954) 110 C.C.C. 97.

52. Smith and Hogan, Criminal Law (4th ed., 1978) at 644.

53. *R.* v. *Ross* (1944) 84 C.C.C. 107 (B.C.C.C.).

54. *R.* v. *Maclean* (1974) 17 C.C.C. (2d) 84 (N.S.C.C.).

55. See Glanville Williams, Textbook of Criminal Law (1978) at p. 409 and the English cases cited therein.

56. Hall and Seligman, "Mistake of Law and *Mens Rea*," (1941) 8 U. Chi. L. Rev. 641 at 652. See also Arnold, "State-Induced Error of Law, Criminal Liability and *Dunn* v. *The Queen:* A Recent Non-Development in Criminal Law," (1978) 4 Dal. L.J. 559 at 579 *et seq.* Reliance on a lawyer's advice was rejected by the Ontario Court of Appeal in *R.* v. *Brinkley,* (1907) 12 C.C.C. 454, and *R. ex. rel. Irwin* v. *Dalley* (1957) 118 C.C.C. 116. *Cf. Long* v. *State (Delaware)* (1949) 65 A.2d 489(Del.S.C.).

57. Proposed Official Draft (1962), § 2.04(3)(b)(iv).

58. Proposed Federal Criminal Code, § 302(5) and 609. See also the Report of the Senate Committee on the Judiciary to Accompany S. 1437, pp. 121 *et seq.*

59. See Williams, Criminal Law (2d ed. 1961) at 302-4. See also *R.* v. *Maclean* (1974) 17 C.C.C. (2d) 84 (N.S.C.C.). For a discussion of the development of this area of the law in the U.S. see Cremer, "The Ironies of Law Reform: A History of Reliance on Officials as a Defense in American Criminal Law" (1978) 14 Cal. W. L. Rev. 48.

60. *United States* v. *Barker and Martinez* (1976) 546 F. 2d 940 (C.A. Dist. Col. Cir.). See also (1975) 514 F.2d 208 (C.A. Dist. Col. Cir.).

61. *United States* v. *Ehrlichman* (1976) 546 F.2d 910. Cert. denied (1977) 97 S.Ct. 1155.

62. Kurland, Watergate and the Constitution (1978), at 71.

63. 546 F.2d 940 at 954.

64. 546 F.2d 940 at 956.

65. 546 F.2d 940 at 957.

66. 546 F.2d 940 at 969.

67. See White, "Reliance on Apparent Authority as a Defense to Criminal Prosecution" (1977) 77 Colum. L. Rev. 775; Walker, "Criminal Law — Mistake of Law Defense Based on Reasonable Reliance on Apparent Authority" (1978) 14 Wake For. L. Rev. 136; Northey, "Expanding the Mistake of Law Doctrine: *United States* v. *Barker*" (1977) 57 Bost. U.L. Rev. 882; Schwartz, "Reform of the Federal Criminal Laws: Issues, Tactics and Prospects," [1977] Duke L.J. 171 at 213-16; and P. Kurland, Watergate and the Constitution (1978).

68. See Y. Dinstein, The Defence of 'Obedience to Superior Orders' in International Law (Leyden, 1965) at pp. 83 *et seq.*

69. Williams, Criminal Law (2d., 1961) at 296; see also Williams, Textbook of Criminal Law (1978) at pp. 408-9; see to the same effect Smith and Hogan, Criminal Law (4th ed. 1978) at 209; LaFave and Scott, Handbook on Criminal Law (1972) at 381; Halsbury's Laws of England (4th ed., Hailsham of St. Marylebone), vol. 11, § 27. For a detailed discussion of the concept see L. C. Green, Superior Orders in National and International Law (Leyden, 1976), and Y. Dinstein, The Defence of 'Obedience to Superior Orders' in International Law (Leyden, 1965). See also the extended review of Green by Dinstein in (1977) 4 Dal. L.J. 221.

70. [1976] 3 All E.R. 140 at p. 146. The proposition that superior orders may give rise to a defence of duress under s. 17 of the Canadian Criminal Code is dubious. S. 17 would only apply if the person giving orders was present at the time of the act and threatened immediate harm; see *The Queen* v. *Carker* (No. 2) [1967] 2 C.C.C. 190 (S.C.C.); *cf. Paquette* (1976) 30 C.C.C. (2d) 417 (S.C.C.).

71. *Keighly* v. *Bell* (1866) 4 F. & F. 763 at 790, 176 E.R. 781 at 793. See also *R.* v. *Smith* (1900) 17 S.C.R. 561 (Cape of Good Hope); Brewer, "Theirs Not to Reason Why — Some Aspects of the Defence of Superior Orders in New Zealand Military Law" (1979) 10 Vic. U.W.L. Rev. 45.

72. Part I (1972), at 296, cited in Green at p. 31.

73. See Williams, Criminal Law (2d ed. 1961) at 300. See also Nichols, "Untying the Soldier by Refurbishing the Common Law" [1976] Crim. L. Rev. 180. And see, in Canada, Regulation 15 to the War Crimes Act, R.S.C. 1970.

74. See Green, "Superior Orders and the Reasonable Man" [1970] Can Y.B. Int'l L. 61 at 65.

75. Queen's Regulations, Art. 19.015; see L. C. Green, Superior Orders in National and International Law (1976), at 54; Sharon A. Williams, International Criminal Law (3rd revised edition, 1978) at pp. 554-55.

76. See LaFave and Scott, Criminal Law (1972) at p. 381; Smith and Hogan, Criminal Law (4th ed., 1978) at p. 209, citing *Lewis* v. *Dickson* [1976] R.T.R. 431 (D.C.).

77. *Brannan* v. *Peek,* [1974] 2 All E.R. 572 at 574. See also The Times (London), December 15, 1962, for a judgment of Howard, J., to the same effect; cited in Green, Superior Orders in National and International Law at p. 29.

78. Williams, Criminal Law (2d ed. 1961) at 300. See also Hyman Gross, A Theory of Criminal Justice (New York, 1979) at pp. 152-5.

79. Schwartz, "Reform of the Federal Criminal Laws: Issues, Tactics and Prospects" [1977] Duke L.J. 171 at 216. See also the Model Penal Code § 2.10 (Proposed Official Draft, 1962), and the Brown Commission Code § 602(2) in the Final Report of the National Commission on Reform of Federal Criminal Laws (1971).

80. The Royal Canadian Mounted Police Act, R.S.C. 1970, c. R-9, s. 36 provides for a number of penalties including "imprisonment for a term not exceeding one year." Bill C-50, introduced on April 28, 1978 which amends the R.C.M.P. Act, eliminates the possibility of imprisonment for a disciplinary offence. The Bill died at the end of the session. Note that members of the R.C.M.P. take an oath that they "will well and truly obey and perform all lawful orders and instructions . . . ." See s. 15 of the R.C.M.P. Act, R.S.C. 1970, c. R-9.

81. See s. 18 of the R.C.M.P. Act, R.S.C. 1970, c. R-9, which provides that "It is the duty of members of the force who are peace officers . . . (a) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime, and of offences against the laws of Canada and the laws in force in any province in which they may be employed. . . ."

82. The defence of superior orders in relation to the military has been accepted by courts in circumstances which raise the constitutional principle embodied in s. 16 of the Interpretation Act, R.S.C. 1970, c. I-23 (discussed earlier) that "no enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except only as therein mentioned or referred to". Thus in *R.* v. *Rhodes* [1934] O.R. 44, the prohibition in the Ontario

Highway Traffic Act, R.S.O. 1927, c. 251, s. 66, against operating a vehicle on a public highway without an operator's licence was held inapplicable to a member of the armed forces driving a car belonging to the Crown while on military duty and in obedience to the order of a superior officer. As the Crown was not expressly mentioned in the Act, it was not bound thereby. In *R.* v. *Stradiotto* [1973] 2 O.R. 375 (C.A.), however, a member of the armed forces was held not to be protected by the same principle against a charge of careless driving, since the soldier's orders could have been properly discharged without committing a breach of the statute. The rationale of the principle is that a member of the armed forces is directly subject to Her Majesty's prerogative of command, which includes the right to order breaches of statutes not binding on Her Majesty (see [1973] 2 O.R. 375 at 379). Whatever the contours of the principle it cannot apply to criminal offences committed by the police. In the first place, as pointed out earlier, s. 16 cannot grant immunity from the *criminal* law to representatives or servants of the Crown. Secondly, police officers are not servants of the Crown in the same way as members of the armed forces are; rather, they are servants *under* the Crown: see *R.* v. *Commissioner of Police of the Metropolis, Ex p. Blackburn* [1968] 2 W.L.R. 893 at 902 (C.A.); *R.* v. *Labour Relations Board; Ex p. Fredericton* (1955) 38 M.P.R. 26 (N.B.Q.B.); *Bruton* v. *Regina City Policemen's Association Loc. 155* [1945] 2 W.W.R. 273 (Sask. C.A.); and *Nicholson* v. *Haldimand-Norfolk Regional Board of Commissioners of Police and A.-G. Ontario* (1978) 23 N.R. 410 at 420 (S.C.C.).

83. S. 32(2).

84. S. 32(3).

85. See the Queensland and Western Australia Codes which provide in s. 31 that a person is not criminally responsible for an act done "(2) In obedience to the order of a competent authority which he is bound to obey, unless the order is manifestly unlawful. . . . Whether an order is or is not manifestly unlawful is a question of law." See Green, Superior Orders in National and International Law (1976) at 70; and C. Howard, Criminal Law (3d ed. 1977) at 424-5.

86. *Hunt* v. *Maloney, Ex parte Hunt* [1959] Qd. R. 164 at 173.

87. Compare *The Queen* v. *Laroche,* [1964] S.C.R. 667. Although it could be argued that this case implicitly accepted the defence, the fact that the conviction was restored, and the reference by Judson, J., for the majority, to "this outrageous defence" (at 671) indicate otherwise. In any event, the case concerns theft with its "colour of right" concept. See also *Rex* v. *Petheran* (1936) 65 C.C.C. 151 (Alta. C.A.).

88. Smith and Hogan, Criminal Law (4th ed., 1978) at 210, for military and non-military cases.

89. See Howard, Criminal Law (3d ed., 1977) at 425.

90. *United States* v. *Ehrlichman* (1976) 546 F.2d 910.

VII. EMERGENCY POWERS (notes to page 106 of text)

1. R.S.C. 1970, c. N-4, Part XI.

2. S. 233. For a discussion of American Law, see Note, "Riot Control and the Use of Federal Troops" (1968) 81 Harv. L. Rev. 638.

3. See Herbert Marx, "The Emergency Power and Civil Liberties in Canada" (1970) 16 McGill L.J. 39 at 55.

4. R.S.C. 1906, c. 41, s. 82.

5. The Militia Act, R.S.C. 1906, c. 41 was amended by S.C. 1924, c. 57 (14-15 Geo. V) to substitute the Attorney-General of a Province as the civil authority designated.

6. Desmond Morton, "Aid to the Civil Power: The Canadian Militia in Support of Social Order, 1867-1914" (1970) 51 Can. Hist. Rev. 407. See also Morton, "Aid to the Civil Power: the Stratford Strike of 1933" in Irving Abella (ed.), On Strike (Toronto, 1974) at p. 79; John Gellner, Bayonets in the Streets (Toronto, 1974) at pp. 131 *et seq.;* S. E. Finer, The Man on Horseback: the Role of the Military in Politics (Penguin ed., 1976); Wade and Phillips, Constitutional and Administrative Law (9th ed., 1977) at pp. 506 *et seq.*

7. See subparagraph (f)(i) of the definition of "peace officer" in s. 2 of the Code: "officers and men of the Canadian Forces who are . . . appointed for the purposes of section 134 of the National Defence Act . . . ."

8. National Defence Act, R.S.C. 1970, c. N-4, s. 239. *Cf.* D. Williams, Keeping the Peace (1967) at 33; I. Brownlie, The Law Relating to Public Order (1968) at 195 *et seq.*

9. See Brigadier-General H. A. McLearn, "Canadian Arrangements for Aid of the Civil Power" [1971] Canadian Defence Quarterly 26 at p. 29. To be safe, the troops could be appointed as special constables by the R.C.M.P. Commissioner under s. 10 of the R.C.M.P. Act, R.S.C. 1970, c. R-9. The Public Order Regulations of October 16, 1970 made under the War Measures Act defined peace officer as including a member of the Canadian Armed Forces, but this would probably apply only to the enforcement of the Regulations.

10. Regulations made pursuant to this subparagraph by the Governor-in-Council under the National Defence Act are exempt from registration and from publication in the Canada Gazette: Statutory Instruments Regulations, s. 14(3), SOR 71-592, Canada Gazette Part II, vol. 105, No. 22, Nov. 9, 1971.

11. See H.C. Debates, April 5, 1918, pp. 378 *et seq.*

12. The British North America Act (1867), 30 & 31 Vict., c. 3, gives, in s. 91(7), exclusive legislative authority to Parliament in relation to "militia, military and naval service, and defence." As Professor A. S. Abel put it, "the scope or limits of this power have never been authoritatively defined": see Laskin's Canadian Constitutional Law (4th ed. rev., Abel, 1975) at 199.

13. See generally, Wade and Phillips, Constitutional and Administrative Law (9th ed., 1977, A. W. Bradley ed.), Keir and Lawson, Cases in Constitutional Law (5th ed. 1967), R. J. Sharpe, Habeas Corpus (1976), and Marx, "The Emergency Power and Civil Liberties in Canada" (1970) 16 McGill L.J. 39. Martial law should not, of course, be confused with military law which deals with the trial of military persons, even though both use the term "court-martial."

14. Keir and Lawson, Cases in Constitutional Law (5th ed., 1967) at 225.

15. M. P. Straus, The Control of Subversive Activities in Canada (Thesis submitted in partial fulfillment of requirements for Ph.D. in Political Science at the University of Illinois, 1969) at 65-66.

16. Straus, The Control of Subversive Activities in Canada, at 76 (Lower Canada legislation) and 77 (Upper Canada legislation).

17. Joint Opinion of the Attorney and Solicitor General, Sir John Campbell and Sir R. M. Rolfe, as to the power of the Governor of Canada to proclaim Martial Law; set out in Keir and Lawson, Cases in Constitutional Law (5th ed., 1967) at 238-9.

18. *R.* v. *Nelson and Brand* (1867) Special Report, cited in R. J. Sharpe, Habeas Corpus.

19. 71 U.S. 2.

20. See Note, "The National Security Interest and Civil Liberties" (1972) 85 Harv. L. Rev. 1130 at 1321-6.

21. Surveillance and Espionage in a Free Society (R. Blum, ed., 1972) at 12.

22. See, e.g., *Ex parte Marais* [1902] A.C. 109 (J.C.P.C.); and *R.* v. *Allen* [1921] 2 I.R. 241 (K.B.D.).

23. See *per* Willes, J., in *Phillips* v. *Eyre* (1870) L.R. 6 Q.B. 1 at 17.

24. *Egan* v. *Macready* [1921] 1 I.R. 265 (Ch.D.).

25. See Keir and Lawson, Cases in Constitutional Law (5th ed., 1967) at 233-7; R. Sharpe, Habeas Corpus (1976) at 108; and Marx, "The Emergency Power and Civil Liberties in Canada (1970) 16 McGill L.J. 39 at 55-6. See also the statement by Brooke Claxton, then Minister of National Defence, in 1950 Commons Committee Proceedings at 12: "Martial Law could only be lawfully proclaimed and enforced in Canada under the authority of an Act of Parliament such as the War Measures Act, or conceivably by some prerogative right . . .", cited in Marx at p. 51.

26. See Marx, 16 McGill L.J. 39 at 53; H.C. Debates, April 5, 1918, pp. 378 *et seq.* The comparable British legislation did not permit martial law by regulation: see Marx, 16 McGill, L.J. 39 at 56.

27. See sections 3 and 4.

28. See Stephen, A History of the Criminal Law of England (1883) vol. II at 251 *et seq.* See also the Treason section, *supra.*

29. Sharpe, Habeas Corpus (1976) at 91.

30. Straus, The Control of Subversive Activities in Canada (1969) at 55.

31. Sharpe, Habeas Corpus (1976) at 92.

32. *Id.*, at 91-2. *Cf. R.* v. *Boyle* (1868) 4 P.R. 256 (Ont.).

33. See Sharpe, Habeas Corpus (1976) at pp. 105 *et seq.*, and Edwards, "Special Powers in Northern Ireland" [1956] Crim. L. Rev. 7. For a critical analysis of the handling of the Northern Ireland problems, see the series of articles by David Lowry: "Internment in Northern Ireland" (1976) 8 Tol. L. Rev. 169; "Terrorism and Human Rights: Counter-Insurgency and Necessity at Common Law" (1977) 53 Notre D. Lawyer 49; and, with R. Spjut, "The European Convention and Human Rights in Northern Ireland (1978) 10 Case W. Res. J. Int'l L. 251. See also O'Boyle, "Torture and Emergency Powers under the European Convention of Human Rights: *Ireland* v. *The United Kingdom*" (1977) 71 Am J. Int'l L. 674, and Lord MacDermott, "Law and Order in Times of Emergency" (1972) 17 Jurid. Rev. (N.S.) 1. For an overview of British legislation for emergencies in her dependencies, see Holland, "Emergency Legislation in the Commonwealth" (1960) 13 Current L. Prob. 148.

34. Report of the Committee of Enquiry into allegations against the security forces of physical brutality in Northern Ireland (1971), Cmnd. 4823.

35. Report of the Committee of Privy Counsellors appointed to consider authorised procedures for the interrogation of persons suspected of terrorism (1972), Cmnd. 4901.

36. Report on Violence and Civil Disturbances in Northern Ireland in 1969 (1972), Cmnd. 4566.

37. Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland (1972), Cmnd. 5185.

38. Report of a Committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland (1975), Cmnd. 5847.

39. 1976, c. 8.

40. See Street, "The Prevention of Terrorism (Temporary Provisions) Act 1974" [1975] Crim. L. Rev. 192; Wade and Phillips, Constitutional and Administrative Law (9th ed., 1977, A. W. Bradley, ed.) at pp. 517-19; Smith and Hogan, Criminal Law (4th ed., 1978) at 812-821. "The powers in the Bill were to a large extent based on those in the Prevention of Violence Act 1939, which had been passed to deal with similar threats from Irish terrorists": Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Acts 1974 and 1976, Cmnd. 7324, August 1978, at p. 2, hereafter cited as the Shackleton Report.

41. S. 12.

42. Sir Robert Mark, In the Office of Constable (London, 1978) at p. 173. For an analysis of the potential effectiveness of the legislation see Paul Wilkinson, Terrorism and the Liberal State (London, 1977) at pp. 162 *et seq.*

43. Shackleton Report at p. 9. See also Wilkinson at pp. 162-3.

44. For comments on the report see The London Times, August 25, 1978; "Terrorism and Police Powers" (1978) 128 New Law Journal 869; "Prevention of Terrorism" [1978] Crim. L. Rev. 650-1; Schiff, [1978] Public Law 352.

45. Shackleton Report at p. 39.

46. Shackleton Report at p. 49. Those of us who worry about English usage will be comforted to see not only a sentence but a whole report end with a preposition.

47. Stat. Can. 1970-71-72, c. 2.

48. See R. Haggart and A. E. Golden, Rumours of War (1971) at 89.

49. S. 2 permitted the proclamation to be retroactive.

50. Stat. Can. 1914 (2d session), c. 2, s. 6. See now R.S.C. 1970, c. W-2, s. 3.

51. Stat. Can. 1914 (2d session), c. 2, s. 3. See now R.S.C. 1970, c. W-2, s. 6.

52. Stat. Can. 1914 (2d session), c. 2, s. 4. See now R.S.C. 1970, c. W-2, s. 2.

53. O'Connor was later Parliamentary Counsel to the Senate and in that capacity authored the well-known Report to the Senate in 1939 (O'Connor Report) relating to the B.N.A. Act. Sir Robert Borden described him as "a capable man of strict integrity, but, occasionally, somewhat eccentric" (letter dated November 25, 1929, Borden Papers, Post 1921 Series, Folder 191, no. 156431).

54. O'Connor's views on the War Measures Act can be found in the notes he prepared for Sir Robert Borden's memoirs: Borden Papers, Memoir Notes, p. 182. Borden never published his memoirs, but his nephew Henry Borden edited Robert Laird Borden: His Memoirs (Toronto, 1938); see p. 458 for a brief reference to the introduction of the War Measures Act. For additional material on the drafting of the Act see Robert Craig Brown and Ramsay Cook, Canada 1896-1921 (Toronto, 1974), pp. 212 *et seq.*; Brown, "The Political Ideas of Robert Borden" in The Political Ideas of the Prime Ministers of Canada (M. Hamelin, ed., Ottawa, 1969) at pp. 93 *et seq.*; Brown, " 'Whither are we being shoved?' Political Leadership in Canada during World War I" in War and Society in North America (Granatstein and Cuff, eds., Toronto, 1971) at p. 107; and David Edward Smith, "Emergency Government in Canada", Canadian Historical Review, vol. L, 1969, at p. 431.

55. DORA as passed and amended in 1914 listed many offences triable by court-martial; see 4 & 5 Geo. 5, c. 29 and c. 63, and 5 Geo. 5, c. 8. These were drastically curtailed in 1915, trial by court-martial of a civilian British subject being permitted only in the event of invasion or other special military emergency; see 5 Geo. 5, c. 34. In the Emergency Powers (Defence) Act, 1939, 2 & 3 Geo. 6, c. 62, no civilian courts-martial were permitted, though this bar was lifted in respect to enemy aliens charged with the most grave war-time offences. Under the threat of invasion, provision was made for a system of war-zone courts which stopped short of substituting courts-martial for the ordinary course of justice. This provision was, of course, never implemented. See Wade and Phillips, Constitutional Law (8th ed., Wade & Bradley eds. 1970) at 413-15.

56. Compare Haggart and Golden, Rumours of War (1971) at 92, who say the Act was designed for this one emergency, with Tarnopolsky, The Canadian Bill of ofRights (1975) at 324, who says it was "drafted so as to remain on the statute books to be invoked when deemed necessary by the executive."

57. 4 & 5 Geo. 5, c. 29, s. 1.

58. H.C. Debates, vol. CXVIII, August 19, 1914, p. 20. See also H.C. Journals, vol. L, August 19, 1914 at pp. 6-7. Section 3 of the Resolution did, however, include "insurrection". Perhaps it contemplated an insurrection during wartime.

59. Stat. Can. 1914 (2d session) c. 2, s. 4.

60. See the earlier discussion on the Strike.

61. The Dominion Archivist Dr. W.I. Smith, in a letter to the writer, stated that "a search of the logical sources in our custody has failed to reveal why the words 'apprehended insurrection' were used .... A search of both the Borden and Meighen Papers proved fruitless in this regard as well ...." I am grateful to Dr. Smith and Dr. Ian McClymont for their assistance on this question.

62. Stat. Can. 1904, c. 23, s. 2(b).

63. This language replaced the earlier Militia Act, R.S.C. 1886, c. 41, s. 79, which did not define "emergency" but allowed the Government to call out the Militia "at any time when it appears advisable so to do by reason of war, invasion or insurrection, or danger of any of them." The comparable U.K. legislation, the Militia Act, 1882, s. 18, permitted the Government to call out the Militia "in case of imminent national danger or of great emergency." When the 1904 Militia Act was going through the Canadian Parliament, Sir Wilfred Laurier stated: "At the present moment we are simply defining what is an emergency, and I do not think my hon. friend [Mr. Fowler] will take exception to the definition."

64. Stat. Can. 1914 (2d session), c. 3, s. 4.

65. There is no similar language in the U.K. legislation, the Postponement of Payments Act, 1914, 4 & 5 Geo. 5, c. 11, after which the Finance Act was modelled — see H.C. Debates, vol. CXVIII, August 21, 1914, p. 48. The U.K. Act was temporary, to be in force for only six months (s. 2(2)). Sir Wilfred Laurier pointed out that the Finance Act appeared to be drafted as a permanent statute, and not temporary as he assumed it would be. Borden acknowledged the truth of this and agreed with Laurier's statement that "if there should be a war next year this law would apply..." — see H.C. Debates, vol. CXVIII, August 21, 1914, p. 52. This recognition and acknowledgement would appear to lend support to the proposition that the War Measures Act, being similarly drafted, was also intended to remain upon the statute-books.

66. 10 & 11 Geo. 5, c. 31 (1920).

67. 10 & 11 Geo. 5, c. 55. See David Williams' Report on the Internal Protection of National Security at 30, and Bunyan, The History and Practice of the Political Police in Britain (1977) at 51 *et seq.*, and 266 *et seq.*

68. The Act was amended by 1964, c. 38 so that the words "... if at any time it appears to His Majesty that any action has been taken or is immediately threatened by any persons or body of persons of such a nature and on so extensive a scale as to be calculated [to deprive the community of the essentials of life]" were replaced with "... if at any time it appears to Her Majesty that there have occurred, or are about to occur, events of such a nature as to be calculated [to deprive, etc.]."

69. See Bunyan, *supra* at p. 54.

70. March 14, 1938, as cited in the Regulations. The Regulations were consolidated in 1942.

71. S.C. 1940, c. 43 (4 Geo. VI).

72. See the National Emergency Transitional Powers Act, S.C. 1945, c. 25 (9-10 Geo. VI), and the Continuation of Transitional Measures Act, S.C. 1947, c. 16 (11 Geo. VI), amended and continued by S.C. 1948, c. 5, S.C. 1949, c. 3, and S.C. 1950, c. 6.

73. S.C. 1951, c. 5 (15 Geo. VI). The U.S. Emergency Detention Act of 1950, 50 U.S.C. § 811, was not repealed until 1971: see (1972) 60 Georgetown L.J. 838.

74. Stat. Can. 1960, c. 44, s. 6.

75. S. 6(2).

76. S. 6(3).

77. S. 6(4).

78. See H.C. Debates, July 1, 1960, pp. 5651-2.

79. H.C. Debates, August 3, 1960, p. 7506.

80. *Ibid.*

81. Defence of Canada Regulations (1942), Reg. 39C.

82. S. 9(1).

83. S. 7(1).

84. S. 10.

85. Note that at the time, killing a peace officer was capital murder.

86. Stat. Can. 1970-71-72, c. 2.

87. 1976, c. 8, s. 1(6).

88. For a full discussion of this feature of the legislation, see Friedland, "Trial under the War Measures Act: Can Crime be Retroactive", Globe and Mail, October 28, 1970. See also Marx, "The 'Apprehended Insurrection' of October 1970 and the Judicial Function" (1972) 7 U.B.C. L. Rev. 55 at 63. Because the Regulations Act, R.S.C. 1970, c. R-5, requires that a regulation be published in the Canada Gazette before a prosecution can be based on it, and because the Gazette was not published until later that day, the government had difficulty in obtaining convictions. It could have exempted the regulations from the Regulations Act, but perhaps at four in the morning no one thought of this important detail.

89. *Fort Frances Pulp & Power Co., Ltd.* v. *Manitoba Free Press Co. Ltd.* [1923] A.C. 695 (J.C.P.C.); *Co-operative Committee on Japanese Canadians* v. *A.-G. Can.* [1947] A.C. 87 (J.C.P.C.); *R.* v. *Gagnon and Vallières* (1971) 14 C.R.N.S. 321 (Que. C.A.). See generally, Marx, (1972) 7 U.B.C.L. Rev. 55.

90. See, in England, *R.* v. *Halliday* [1917] A.C. 260, *Liversidge* v. *Anderson* [1942] A.C. 206, and *Greene* v. *Secretary of State for Home Affairs* [1942] A.C. 206. See also, in Canada, *Re Beranek* (1915) 33 O.L.R. 139 (Ont. S.C.), *Re Gray* (1918) 57 S.C.R. 150, *Ex p. Sullivan* (1941) 75 C.C.C. 70 (Ont. S.C.), *Re Steele* (1942) 77 C.C.C. 307 (Ont. S.C.), and *Re Carriere* (1942) 79 C.C.C. 329 (Que. Sup. Ct.). See generally Sharpe, Habeas Corpus (1976), Chapter IV ("Habeas Corpus and the Executive").

91. H.C. Debates, May 13, 1971 at 5778.

92. See H.C. Debates, October 27, 1975 at 8557 and October 29, 1975 at 8651 (Acting Prime Minister Sharpe: "it is still the intention of the government to bring forward legislation to replace the War Measures Act to deal with civil disorders."); October 28, 1975 at 8613 and December 8, 1975 at 9796 (Prime Minister Trudeau); and December 5, 1975 at 9759 (Solicitor-General Allmand: "it is my understanding that some of it is being drafted.").

93. Submissions to the Hon. John Turner Re Emergency Powers From the Canadian Civil Liberties Association, March 29, 1971, at 3.

94. See J.B. Stewart, The Canadian House of Commons: Procedure and Reform (Montreal, 1977), chapter 9.

95. See s. 6 of the Criminal Code, enacted Stat. Can. 1972, c. 13. Although Extradition Treaties do not allow extradition for political crimes, Canada and England have been reluctant to classify acts of terrorism as political crimes: see La Forest, Extradition to and from Canada (2nd ed., 1977), chapter 4. No attempt is made in this paper to deal with the growing literature on the subject of terrorism. Some of the recent books are Crelinsten, Laberge-Altmejd, and Szabo, Terrorism and Criminal Justice: An International Perspective (Lexington, Mass., 1978); Walter Laqueur, Terrorism (London, 1977); P. Wilkinson, Terrorism and the Liberal State (London, 1977); M.C. Bassiouni, International Terrorism and Political Crimes (Springfield, 1975); R. Clutterbuck, Living with Terrorism (London, 1975) and R. Clutterbuck, Kidnap and Ranson (London, 1978).

96. Temporary Immigration Security Act, 1974-75-76 Stat. Can. c. 85. See also House of Commons Debates, February 26, 1976 at pp. 11281 *et seq.*

97. *A.-G. (Can.) and Dupond* v. *Montreal* [1978] 2 S.C.R. 770. See also *R.* v. *Engler and Latimer* (1978) 44 C.C.C. (2d) 1 (Alta. C.A.).

98. In some cases it might be possible to justify a search without warrant under s. 27 of the Code which provides that "Every one is justified in using as much force as is reasonably necessary ... to prevent the commission of an offence ...."; but the section, the application of which is not at all clear, would not seem to cover the wider powers or search envisioned in the text.

99. See the discussion on "Security and the safeguarding of plutonium" in the Sixth Report of the Royal Commission on Environmental Pollution (1976), Cmnd. 6618, chapter VII. See also William Epstein, "Nuclear Terrorism and Nuclear War" in F. Griffiths and J.C. Polanyi,

Dangers of Nuclear War by the Year 2000 (Toronto, publication pending, 1979). The director of the F.B.I. recently described miniature nuclear explosive devices with substantial destructive capability: the Globe and Mail, April 26, 1979.

100. Stat. Can. 1960, c. 44, s. 6, which added s. 6(5) to the War Measures Act, R.S.C. 1970, c. W-2: "Any act or thing done or authorized or any order or regulation made under the authority of this Act, shall be deemed not to be an abrogation, abridgement or infringement of any right or freedom recognized by the *Canadian Bill of Rights*."

101. See the document issued by the Hon. Otto Lang, Canadian Charter of Rights and Freedoms (August, 1978) at p. 16. See also the Second Report from the Special Joint Committee of the Senate and the House of Commons on the Constitution, October 4, 1978, Appendix A to the Senate Debates, October 10, 1978 at p. 1055.

102. *Ibid. Cf.* the Report by the C.B.A. Committee on the Constitution, Towards a New Canada (1978) at p. 141: "we would permit such suspension in the exercise of emergency powers during war, invasion or insurrection." See also the Report of the Task Force on Canadian Unity, Coming to Terms, February, 1979, at p. 49, and A Future Together, January, 1979, at p. 127. The latter report states: "The Parliament of Canada should stipulate by legislation the powers it needs in cases of emergency; safeguards for provincial powers and for individual rights should vary depending on whether the country is facing a wartime or a peacetime emergency."

103. T.S. No. 71; (1951) 45 Am.J. Int'l L. Supp. p. 24; entered into force 1953.

104. U.N. GAOR (XXI) Supp. No. 16, U.N. Doc. A/6316, p. 49; (1967) 61 Am. J. Int'l L. 870; entered into force 1976.

105. European Convention, Article 15; the International Covenant, Article 4 is similar. Both permit derogation only "to the extent strictly required by the exigencies of the situation." The Covenant further requires that the emergency be "officially proclaimed", and that no derogation involve discrimination "solely on the ground of race, colour, sex, language, religion or social origin." Some specific rights can be restricted even though the life of the nation is not threatened. For example, freedom of movement within the territory (Article 12) can be subjected to restrictions which "are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."

106. See generally Higgins, "Derogations under Human Rights Treaties" (1978) 48 Brit. Y.B. Int'l L. 281; O'Donnell, "States of Exception" (1978) 21 I.C.J. Rev. 52.

107. Accession in force August 19, 1976; see Order-in-Council P.C. 1976-1156 of May 18, 1976, and Fischer, "The Human Rights Covenants and Canadian Law," [1977] Can. Y.B. Int'l L. 42, who deals with the problems of implementing the Covenant. Little consideration is there given to emergency powers except to note (at p. 50) that "The War Measures Act ... does not appear to be entirely consistent with [the Article 4 derogation] requirements." The procedures for "ensuring full compliance" in Canada were negotiated at a federal-provincial conference of ministers responsible for human rights matters in December 1975: see Department of External Affairs Annual Review 1976 (Ottawa 1977) at p. 38.

108. Article 6.

109. Article 7.

110. Article 8(1) and (2).

111. Article 11.

112. Article 15. It is arguable, though by no means clear, that the quasi-retroactive regulations concerning FLQ membership made under the War Measures Act in October 1970 would have breached this article had the Covenant been in force in Canada at the time.

113. Article 16.

114. Article 18. Subsection 3 adds that freedom to "manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."

115. Canada also acceded (Order-in-Council P.C. 1976-1156 of May 18, 1976) to the Optional Protocol to the International Covenant which in Articles 1 and 2 gives to individuals within Canada who claim to be victims of a violation of the rights set forth in the Covenant the right to submit a written communication to the Human Rights Committee at the U.N. for consideration by the Committee.

Part Five: THE ROLE OF THE JUDICIARY

(notes to pages 117-120 of text)

1. House of Commons, Debates, January 31, 1978 at p. 2380.

2. Justice and Legal Affairs (Issue No. 34), June 1, 1978 at pp. 9-10.

3. *Supra*, Part Three, section IIA.

4. *Supra*, Part Four, section II.

5. *Supra*, Part Four, section VIID.

6. *Supra*, Part Three, section III.

7. For a discussion of the role of Parliament in security matters see C.E.S. Franks, Parliament and Security Matters.

8. July, 1978, Cmnd. 7285 at p. 20. See also the Report by Justice, Freedom of Information (1978, A. Lincoln, chairman) at p. 15.

9. See, e.g., P. Russell, "Judicial Power in Canada's Political Culture" in M.L. Friedland (ed.) Courts and Trials: A Multidisciplinary Approach (Toronto, 1975) at p. 75, and D. Smiley, "Courts, Legislatures, and the Protection of Human Rights" in Friedland, *ibid.* at p. 89. Professor Smiley takes a consistent approach in his paper for the Ontario Commission on Freedom of Information and Individual Privacy, The Freedom of Information Issue: a Political Analysis (1978) at p. 79: "the judicial role should be narrowly restricted."

10. House of Commons, Debates, May 30, 1978, at pp. 5872 *et seq.*

11. S. 14(2).

12. [1968] A.C. 910.

13. See *U.S.* v. *U.S. Dist. Ct.* (1972) 92 S.Ct. 2125, and *Zweibon* v. *Mitchell* (1975) 516 F.2d 594 (C.A., Dist. Col.).

14. Public Law 95-511, s. 103.

15. 19 St. Tr. 1030.

16. Foreign Intelligence Surveillance Act, 1978, Public Law 95-511, s. 102. The Canadian Diplomatic and Consular Privileges and Immunities Act, Stat. Can. 1977, c. 31 incorporates parts of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. These "have the force of law in Canada in respect of all countries". Article 22 of the Convention on Diplomatic Relations provides, for example, that "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage .... The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution". Does this supersede section 16 of the Official Secrets Act? Section 3 of the Diplomatic and Consular Privileges and Immunities Act states that "In the event of any inconsistency between this Act ... or the provisions given the force of law ... and any other law, this Act ... and those provisions prevail to the extent of the inconsistency." Is there inconsistency if the bugging is done under section 16 to prevent or detect "subversive activity"? In any event, note section 2(4) of the Diplomatic and Consular Privileges and

(notes to page 120 of text)

Immunities Act which permits the Minister of External Affairs, whenever it appears "that the privileges and immunities accorded to a Canadian diplomatic post or consular post in any country, or to persons connected with any such post, are less than those conferred by this Act on that country's diplomatic post or consular post...", to "withdraw from any or all of that country's posts or from any or all persons connected therewith such of the privileges and immunities so conferred as he deems proper."

17. Stat. Can. 1976-77, c. 52, s. 39.

18. See, e.g., *R.* v. *Bottrill, Ex p. Kuechenmeister* [1947] 1 K.B. 41 (C.A.).

19. *Supra*, Part Four, section VI. The judiciary should, however, be involved in declaring a limited emergency to justify wider search powers, if the law is changed to permit this, as suggested in an earlier section.

20. See *Duff Development Co. Ltd.* v. *Government of Kelantan* [1924] A.C. 797.

21. S.6(2).

Part Six: CONCLUSION

(notes to pages 123-124 of text)

1. R.S.C. 1970, c. O-3.

2. [1951] S.C.R. 265.

3. R.S.C. 1970, c. W-2.

Appendix

SOME RELEVANT STATUTES

Page

I THE CANADIAN CRIMINAL CODE (EXCERPTS)..... 189

II THE OFFICIAL SECRETS ACT..... 207

III THE WAR MEASURES ACT..... 217

I

THE CRIMINAL CODE

R.S.C. 1970, c. C-34, as amended

INTERPRETATION

2. In this Act...

"every one," "person," "owner," and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively;

"peace officer" includes

(a) a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer and justice of the peace,

(b) a warden, deputy warden, instructor, keeper, gaoler, guard and any other officer or permanent employee of a prison,

(c) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process,

(d) an officer or person having the powers of a customs or excise officer when performing any duty in the administration of the *Customs Act* or the *Excise Act*,

(d.1) a person appointed or designated as a fishery officer under the *Fisheries Act* when performing any of his duties or functions pursuant to that Act,

(e) the pilot in command of an aircraft

(i) registered in Canada under regulations made under the *Aeronautics Act*, or

(ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft registered in Canada under those regulations,

while the aircraft is in flight, and

(f) officers and men of the Canadian Forces who are

(i) appointed for the purposes of section 134 of the *National Defence Act*, or

(ii) employed on duties that the Governor in Council, in regulations made under the *National Defence Act* for the purposes of this paragraph, has prescribed to be of such a kind as to necessitate that the officers and men performing them have the powers of peace officers;

PROTECTION OF PERSONS ACTING UNDER AUTHORITY — Idem — When not protected — When protected.

25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

(a) as a private person,

(b) as a peace officer or public officer,

(c) in aid of a peace officer or public officer, or

(d) by virtue of his office,

is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

USE OF FORCE TO SUPPRESS RIOT — Person bound by military law — Obeying order of peace officer — Apprehension of serious mischief — Question of law.

32. (1) Every peace officer is justified in using or in ordering the use of as much force as he believes, in good faith and on reasonable and probable grounds,

(a) is necessary to suppress a riot, and

(b) is not excessive, having regard to the danger to be apprehended from the continuance of the riot.

(2) Every one who is bound by military law to obey the command of his superior officer is justified in obeying any command given by his superior officer for the suppression of a riot unless the order is manifestly unlawful.

(3) Every one is justified in obeying an order of a peace officer to use force to suppress a riot if

(a) he acts in good faith, and

(b) the order is not manifestly unlawful.

(4) Every one who, in good faith and on reasonable and probable grounds, believes that serious mischief will result from a riot before it is possible to secure the attendance of a peace officer is justified in using as much force as he believes in good faith and on reasonable grounds,

(a) is necessary to suppress the riot, and

(b) is not excessive, having regard to the danger to be apprehended from the continuance of the riot.

(5) For the purposes of this section the question whether an order is manifestly unlawful or not is a question of law.

HIGH TREASON — Treason — Canadian citizen — Overt act.

46. (1) Every one commits high treason who, in Canada,

(a) kills or attempts to kill Her Majesty, or does her any bodily harm tending to death or destruction, maims or wounds her, or imprisons or restrains her;

(b) levies war against Canada or does any act preparatory thereto; or

(c) assists an enemy at war with Canada, or any armed forces against whom Canadian Forces are engaged in hostilities whether or not a state of war exists between Canada and the country whose forces they are.

(2) Every one commits treason who, in Canada,

(a) uses force or violence for the purpose of overthrowing the government of Canada or a province;

(b) without lawful authority, communicates or makes available to an agent of a state other than Canada, military or scientific information or any sketch, plan, model, article, note or document of a military or scientific character that he knows or ought to know may be used by that state for a purpose prejudicial to the safety or defence of Canada;

(c) conspires with any person to commit high treason or to do anything mentioned in paragraph (*a*);

(d) forms an intention to do anything that is high treason or that is mentioned in paragraph (*a*) and manifests that intention by an overt act; or

(e) conspires with any person to do anything mentioned in paragraph (*b*) or forms an intention to do anything mentioned in paragraph (*b*) and manifests that intention by an overt act.

(3) Notwithstanding subsection (1) or (2), a Canadian citizen or a person who owes allegiance to Her Majesty in right of Canada,

(a) commits high treason if, while in or out of Canada, he does anything mentioned in subsection (1); or

(b) commits treason if, while in or out of Canada, he does anything mentioned in subsection (2).

(4) Where it is treason to conspire with any person, the act of conspiring is an overt act of treason.

PUNISHMENT FOR HIGH TREASON — Punishment for treason — Corroboration — Minimum punishment.

47. (1) Every one who commits high treason is guilty of an indictable offence and shall be sentenced to imprisonment for life.

(2) Every one who commits treason is guilty of an indictable offence and is liable

(a) to be sentenced to imprisonment for life if he is guilty of an offence under paragraph 46(2)(*a*), (*c*) or (*d*);

(b) to be sentenced to imprisonment for life if he is guilty of an offence under paragraph 46(2)(*b*) or (*e*) committed while a state of war exists between Canada and another country; or

(c) to be sentenced to imprisonment for fourteen years if he is guilty of an offence under paragraph 46(2)(*b*) or (*e*) committed while no state of war exists between Canada and another country.

(3) No person shall be convicted of high treason or treason upon the evidence of only one witness, unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.

(4) For the purposes of Part XX, the sentence of imprisonment for life prescribed by subsection (1) is a minimum punishment.

LIMITATION — Information for treasonable words.

48. (1) No proceedings for an offence of treason as defined by paragraph 46(2)(*a*) shall be commenced more than three years after the time when the offence is alleged to have been committed.

(2) No proceedings shall be commenced under section 47 in respect of an overt act of treason expressed or declared by open and considered speech unless

(a) an information setting out the overt act and the words by which it was expressed or declared is laid under oath before a justice within six days after the time when the words are alleged to have been spoken, and

(b) a warrant for the arrest of the accused is issued within ten days after the time when the information is laid.

ASSISTING ALIEN ENEMY TO LEAVE CANADA, OR OMITTING TO PREVENT TREASON — Punishment.

50. (1) Every one commits an offence who

(a) incites or wilfully assists a subject of

(i) a state that is at war with Canada, or

(ii) a state against whose forces Canadian Forces are engaged in hostilities, whether or not a state of war exists between Canada and the state whose forces they are,

to leave Canada without the consent of the Crown, unless the accused establishes that assistance to the state referred to in subparagraph (i) or the forces of the state referred to in subparagraph (ii), as the case may be, was not intended thereby; or

(b) knowing that a person is about to commit treason does not, with all reasonable dispatch, inform a justice of the peace or other peace officer thereof or make other reasonable efforts to prevent that person from committing high treason or treason.

(2) Every one who commits an offence under subsection (1) is guilty of an indictable offence and is liable to imprisonment for fourteen years.

SABOTAGE — "Prohibited act" — Saving — Idem.

52. (1) Every one who does a prohibited act for a purpose prejudicial to

(a) the safety, security or defence of Canada, or

(b) the safety or security of the naval, army or air forces of any state other than Canada that are lawfully present in Canada,

is guilty of an indictable offence and is liable to imprisonment for ten years.

(2) In this section, "prohibited act" means an act or omission that

(a) impairs the efficiency or impedes the working of any vessel, vehicle, aircraft, machinery, apparatus or other thing, or

(b) causes property, by whomsoever it may be owned, to be lost, damaged or destroyed.

(3) No person does a prohibited act within the meaning of this section by reason only that

(a) he stops work as a result of the failure of his employer and himself to agree upon any matter relating to his employment,

(b) he stops work as a result of the failure of his employer and a bargaining agent acting on his behalf to agree upon any matter relating to his employment, or

(c) he stops work as a result of his taking part in a combination of workmen or employees for their own reasonable protection as workmen or employees.

(4) No person does a prohibited act within the meaning of this section by reason only that he attends at or near or approaches a dwelling-house or place for the purpose only of obtaining or communicating information.

INCITING TO MUTINY.

53. Every one who

(a) attempts, for a traitorous or mutinous purpose, to seduce a member of the Canadian Forces from his duty and allegiance to Her Majesty, or

(b) attempts to incite or to induce a member of the Canadian Forces to commit a traitorous or mutinous act,

is guilty of an indictable offence and is liable to imprisonment for fourteen years.

ASSISTING DESERTER.

54. Every one who aids, assists, harbours or conceals a person who he knows is a deserter or absentee without leave from the Canadian Forces is guilty of an offence punishable on summary conviction, but no proceedings shall be instituted under this section without the consent of the Attorney General of Canada.

EVIDENCE OF OVERT ACTS.

55. In proceedings for an offence against any provision in section 47 or sections 49 to 53, no evidence is admissible of an overt act unless that overt act is set out in the indictment or unless the evidence is otherwise relevant as tending to prove an overt act that is set out therein.

OFFENCES IN RELATION TO MEMBERS OF R.C.M.P.

57. Every one who wilfully

(a) procures, persuades or counsels a member of the Royal Canadian Mounted Police to desert or absent himself without leave,

(b) aids, assists, harbours or conceals a member of the Royal Canadian Mounted Police who he knows is a deserter or absentee without leave, or

(c) aids or assists a member of the Royal Canadian Mounted Police to desert or absent himself without leave, knowing that the member is about to desert or absent himself without leave,

is guilty of an offence punishable on summary conviction.

SEDITIOUS WORDS — Seditious libel — Seditious conspiracy — Seditious intention.

60. (1) Seditious words are words that express a seditious intention.

(2) A seditious libel is a libel that expresses a seditious intention.

(3) A seditious conspiracy is an agreement between two or more persons to carry out a seditious intention.

(4) Without limiting the generality of the meaning of the expression "seditious intention", every one shall be presumed to have a seditious intention who

(a) teaches or advocates, or

(b) publishes or circulates any writing that advocates,

the use, without the authority of law, of force as a means of accomplishing a governmental change within Canada.

EXCEPTION.

61. Notwithstanding subsection 60(4), no person shall be deemed to have a seditious intention by reason only that he intends, in good faith,

(a) to show that Her Majesty has been misled or mistaken in her measures;

(b) to point out errors or defects in

(i) the government or constitution of Canada or a province,

(ii) the Parliament of Canada or the legislature of a province, or

(iii) the administration of justice in Canada;

(c) to procure, by lawful means, the alteration of any matter of government in Canada; or

(d) to point out, for the purpose of removal, matters that produce or tend to produce feelings of hostility and ill-will between different classes of persons in Canada.

PUNISHMENT OF SEDITIOUS OFFENCES.

62. Every one who

(a) speaks seditious words,

(b) publishes a seditious libel, or

(c) is a party to a seditious conspiracy,

is guilty of an indictable offence and is liable to imprisonment for fourteen years.

OFFENCES IN RELATION TO MILITARY FORCES — "Member of a force"

63. (1) Every one who wilfully

(a) interferes with, impairs or influences the loyalty or discipline of a member of a force,

(b) publishes, edits, issues, circulates or distributes a writing that advises, counsels or urges insubordination, disloyalty, mutiny or refusal of duty by a member of a force, or

(c) advises, counsels, urges or in any manner causes insubordination, disloyalty, mutiny or refusal of duty by a member of a force,

is guilty of an indictable offence and is liable to imprisonment for five years.

(2) In this section, "member of a force" means a member of

(a) the Canadian Forces, or

(b) the naval, army or air forces of a state other than Canada that are lawfully present in Canada.

Unlawful Assemblies and Riots

UNLAWFUL ASSEMBLY — Lawful assembly becoming unlawful — Exception.

64. (1) An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when they are assembled as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds, that they

(a) will disturb the peace tumultuously, or

(b) will by that assembly needlessly and without reasonable cause provoke other persons to disturb the peace tumultuously.

(2) Persons who are lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in a manner that would have made the assembly unlawful if they had assembled in that manner for that purpose.

(3) Persons are not unlawfully assembled by reason only that they are assembled to protect the dwelling-house of any one of them against persons who are threatening to break and enter it for the purpose of committing an indictable offence therein.

RIOT.

65. A riot is an unlawful assembly that has begun to disturb the peace tumultuously.

PUNISHMENT OF RIOTER.

66. Every one who takes part in a riot is guilty of an indictable offence and is liable to imprisonment for two years.

PUNISHMENT FOR UNLAWFUL ASSEMBLY.

67. Every one who is a member of an unlawful assembly is guilty of an offence punishable on summary conviction.

READING PROCLAMATION.

68. A justice, mayor or sheriff or the lawful deputy of a mayor or sheriff who receives notice that, at any place within his jurisdiction, twelve or more persons are unlawfully and riotously assembled together, shall go that place and, after approaching as near as safely he may do, if he is satisfied that a riot is in progress, shall command silence and thereupon make or cause to be made in a loud voice a proclamation in the following words or to the like effect:

Her Majesty the Queen charges and commands all persons being assembled immediately to disperse and peaceably to depart to their habitations or to their lawful business upon the pain of being guilty of an offence for which, upon conviction, they may be sentenced to imprisonment for life. GOD SAVE THE QUEEN.

OFFENCES RELATED TO PROCLAMATION.

69. Every one is guilty of an indictable offence and is liable to imprisonment for life who

(a) opposes, hinders or assaults, wilfully and with force, a person who begins to make or is about to begin to make or is making the proclamation referred to in section 68 so that it is not made,

(b) does not peaceably disperse and depart from a place where the proclamation referred to in section 68 is made within thirty minutes after it is made, or

(c) does not depart from a place within thirty minutes when he has reasonable ground to believe that the proclamation referred to in section 68 would have been made in that place if some person had not opposed, hindered or assaulted, wilfully and with force, a person who would have made it.

NEGLECT BY PEACE OFFICER.

70. A peace officer who receives notice that there is a riot within his jurisdiction and, without reasonable excuse, fails to take all reasonable steps to suppress the riot is guilty of an indictable offence and is liable to imprisonment for two years.

ORDERS BY GOVERNOR IN COUNCIL — General or special order — Punishment.

71. (1) The Governor in Council may from time to time by proclamation make orders

(a) to prohibit assemblies, without lawful authority, of persons for the purpose

(i) of training or drilling themselves,

(ii) of being trained or drilled to the use of arms, or

(iii) of practising military exercises; or

(b) to prohibit persons when assembled for any purpose from training or drilling themselves or from being trained or drilled.

(2) An order that is made under subsection (1) may be general or may be made applicable to particular places, districts or assemblies to be specified in the order.

(3) Every one who contravenes an order made under this section is guilty of an indictable offence and is liable to imprisonment for five years.

FORCIBLE ENTRY.

73. A person commits forcible entry when he enters real property that is in actual and peaceable possession of another in a manner that is likely to cause a breach of the peace of reasonable apprehension of a breach of the peace, whether or not he is entitled to enter.

PUNISHMENT.

74. Every one who commits forcible entry or forcible detainer is guilty of an indictable offence and is liable to imprisonment for two years.

BREACH OF TRUST BY PUBLIC OFFICER.

111. Every official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and is liable to imprisonment for five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person.

DISOBEYING A STATUTE.

115. (1) Every one who, without lawful excuse, contravenes an Act of the Parliament of Canada by wilfully doing anything that it forbids or by wilfully omitting to do anything that it requires to be done is, unless some penalty or punishment is expressly provided by law, guilty of an indictable offence and is liable to imprisonment for two years.

TRESPASSING AT NIGHT.

173. Every one who, without lawful excuse the proof of which lies upon him, loiters or prowls at night upon the property of another person near a dwelling house situated on that property is guilty of an offence punishable on summary conviction.

Blasphemous Libel

OFFENCE — Question of fact — Saving.

260. (1) Every one who publishes a blasphemous libel is guilty of an indictable offence and is liable to imprisonment for two years.

(2) It is a question of fact whether or not any matter that is published is a blasphemous libel.

(3) No person shall be convicted of an offence under this section for expressing in good faith and in decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion upon a religious subject.

Defamatory Libel

DEFINITION — Mode of expression.

262. (1) A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.

(2) A defamatory libel may be expressed directly or by insinuation or irony

(a) in words legibly marked upon any substance, or

(b) by any object signifying a defamatory libel otherwise than by words.

PUBLISHING.

263. A person publishes a libel when he

(a) exhibits it in public,

(b) causes it to be read or seen, or

(c) shows or delivers it or causes it to be shown or delivered, with intent that it should be read or seen by the person whom it defames or by any other person.

PUNISHMENT OF LIBEL KNOWN TO BE FALSE.

264. Every one who publishes a defamatory libel that he knows is false is guilty of an indictable offence and is liable to imprisonment for five years.

PUNISHMENT FOR DEFAMATORY LIBEL.

265. Every one who publishes a defamatory libel is guilty of an indictable offence and is liable to imprisonment for two years.

PUBLIC BENEFIT.

273. No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter that, on reasonable grounds, he believes is true, and that is relevant to any subject of public interest, the public discussion of which is for the public benefit.

FAIR COMMENT ON PUBLIC PERSON OR WORK OF ART.

274. No person shall be deemed to publish a defamatory libel by reason only that he publishes fair comments

(a) upon the public conduct of a person who takes part in public affairs, or

(b) upon a published book or other literary production or on any composition or work of art or performance publicly exhibited, or on any other communication made to the public on any subject, if the comments are confined to criticism thereof.

WHEN TRUTH A DEFENCE.

275. No person shall be deemed to publish a defamatory libel where he proves that the publication of the defamatory matter in the manner in which it was published was for the public benefit at the time when it was published and that the matter itself was true.

PUBLICATION INVITED OR NECESSARY.

276. No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter

(a) on the invitation or challenge of the person in respect of whom it is published, or

(b) that it is necessary to publish in order to refute defamatory matter published in respect of him by another person,

if he believes that the defamatory matter is true and it is relevant to the invitation, challenge or necessary refutation, as the case may be, and does not in any respect exceed what is reasonably sufficient in the circumstances.

ANSWERS TO INQUIRIES.

277. No person shall be deemed to publish a defamatory libel by reason only that he publishes, in answer to inquiries made to him, defamatory matter relating to a subject-matter in respect of which the person by whom or on whose behalf the inquiries are made has an interest in knowing the truth or who, on reasonable grounds, the person who publishes the defamatory matter believes has such an interest, if

(a) the matter is published, in good faith, for the purpose of giving information in answer to the inquiries,

(b) the person who publishes the defamatory matter believes that it is true,

(c) the defamatory matter is relevant to the inquiries, and

(d) the defamatory matter does not in any respect exceed what is reasonably sufficient in the circumstances.

GIVING INFORMATION TO PERSON INTERESTED.

278. No person shall be deemed to publish a defamatory libel by reason only that he publishes to another person defamatory matter for the purpose of giving information to that person with respect to a subject-matter in which the person to whom the information is given has, or is believed on reasonable grounds by the person who gives it to have, an interest in knowing the truth with respect to that subject-matter if

(a) the conduct of the person who gives the information is reasonable in the circumstances,

(b) the defamatory matter is relevant to the subject-matter, and

(c) the defamatory matter is true, or if it is not true, is made without ill-will toward the person who is defamed and is made in the belief, on reasonable grounds, that it is true.

PUBLICATION IN GOOD FAITH FOR REDRESS OF WRONG.

279. No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter in good faith for the purpose of seeking remedy or redress for a private or public wrong or grievance from a person who has, or who on reasonable grounds he believes has the right or is under an obligation to remedy or redress the wrong or grievance, if

(a) he believes that the defamatory matter is true,

(b) the defamatory matter is relevant to the remedy or redress that is sought, and

(c) the defamatory matter does not in any respect exceed what is reasonably sufficient in the circumstances.

PROVING PUBLICATION BY ORDER OF LEGISLATURE — Directing verdict — Certificate of order.

280. (1) An accused who is alleged to have published a defamatory libel may, at any stage of the proceedings, adduce evidence to prove that the matter that is alleged to be defamatory was contained in a paper published by order or under the authority of the Senate or House of Commons or a legislature.

(2) Where at any stage in proceedings referred to in subsection (1) the court, judge, justice or magistrate is satisfied that matter alleged to be defamatory was contained in a paper published by order or under the authority of the Senate or House of Commons or a legislature, he shall direct a verdict of not guilty to be entered and shall discharge the accused.

(3) For the purposes of this section a certificate under the hand of the Speaker or clerk of the Senate or House of Commons or a legislature to the effect that the matter that is alleged to be defamatory was contained in a paper published by order or under the authority of the Senate, House of Commons or legislature, as the case may be, is conclusive evidence thereof.

Verdicts

VERDICTS IN CASES OF DEFAMATORY LIBEL.

281. Where, on the trial of an indictment for publishing a defamatory libel, a plea of not guilty is pleaded, the jury that is sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon the indictment, and shall not be required or directed by the judge to find the defendant guilty merely on proof of publication by the defendant of the alleged defamatory libel, and of the sense ascribed thereto in the indictment, but the judge may, in his discretion, give a direction or opinion to the jury on the matter in issue as in other criminal proceedings, and the jury may, on the issue, find a special verdict.

Hate Propaganda

ADVOCATING GENOCIDE — "Genocide" — Consent — "Identifiable group".

281.1 (1) Every one who advocates or promotes genocide is guilty of an indictable offence and is liable to imprisonment for five years.

(2) In this section "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely:

(a) killing members of the group, or

(b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

(3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.

(4) In this section "identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin.

PUBLIC INCITEMENT OF HATRED — Wilful promotion of hatred — Defences — Forfeiture — Exemption from seizure of communication facilities — Consent — Definitions — "Communicating" — "Identifiable group" — "Public place" — "Statements".

281.2 (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, is guilty of

(a) an indictable offence and is liable to imprisonment for two years; or

(b) an offence punishable on summary conviction.

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

(a) an indictable offence and is liable to imprisonment for two years; or

(b) an offence punishable on summary conviction.

(3) No person shall be convicted of an offence under subsection (2)

(a) if he establishes that the statements communicated were true;

(b) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject;

(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or

(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

(4) Where a person is convicted of an offence under section 281.1 or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, upon such conviction, may, in addition to any other punishment imposed, be ordered by the presiding magistrate or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.

(5) Subsections 181(6) and (7) apply *mutatis mutandis* to section 281.1 or subsection (1) or (2) of this section.

(6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

(7) In this section

"communicating" includes communicating by telephone, broadcasting or other audible or visible means;

"identifiable group" has the same meaning as it has in section 281.1;

"public place" includes any place to which the public have access as of right or by invitation, express or implied;

"statements" includes words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations.

Breaking and Entering

BREAKING AND ENTERING WITH INTENT, COMMITTING OFFENCE OR BREAKING OUT — Presumptions — "Place".

306. (1) Every one who

(a) breaks and enters a place with intent to commit an indictable offence therein,

(b) breaks and enters a place and commits an indictable offence therein, or

(c) breaks out of a place after

(i) committing an indictable offence therein, or

(ii) entering the place with intent to commit an indictable offence therein,

is guilty of an indictable offence and is liable

(d) to imprisonment for life, if the offence is committed in relation to a dwelling-house, or

(e) to imprisonment for fourteen years, if the offence is committed in relation to a place other than a dwelling-house.

(2) For the purposes of proceedings under this section, evidence that an accused

(a) broke and entered a place is, in the absence of any evidence to the contrary, proof that he broke and entered with intent to commit an indictable offence therein; or

(b) broke out of a place is, in the absence of any evidence to the contrary, proof that he broke out after

(i) committing an indictable offence therein, or

(ii) entering with intent to commit an indictable offence therein.

(4) For the purposes of this section, "place" means

(a) a dwelling-house;

(b) a building or structure or any part thereof, other than a dwelling-house;

(c) a railway vehicle, vessel, aircraft or trailer; or

(d) a pen or enclosure in which fur-bearing animals are kept in captivity for breeding or commercial purposes.

BEING UNLAWFULLY IN DWELLING-HOUSE — Presumption.

307. (1) Every one who without lawful excuse, the proof of which lies upon him, enters or is in a dwelling-house with intent to commit an indictable offence therein is guilty of an indictable offence and is liable to imprisonment for ten years.

(2) For the purposes of proceedings under this section, evidence that an accused, without lawful excuse, entered or was in a dwelling-house is, in the absence of any evidence to the contrary, proof that he entered or was in the dwelling-house with intent to commit an indictable offence therein.

Mischief

MISCHIEF — Punishment — Idem — Idem — Offence — Saving — Idem.

387. (1) Every one commits mischief who wilfully

(a) destroys or damages property,

(b) renders property dangerous, useless, inoperative or ineffective,

(c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property, or

(d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

(2) Every one who commits mischief that causes actual danger to life is guilty of an indictable offence and is liable to imprisonment for life.

(3) Every one who commits mischief in relation to public property is guilty of

(a) an indictable offence and is liable to imprisonment for fourteen years, or

(b) an offence punishable on summary conviction.

(4) Every one who commits mischief in relation to private property is guilty of

(a) an indictable offence and is liable to imprisonment for five years, or

(b) an offence punishable on summary conviction.

(5) Every one who wilfully does an act or wilfully omits to do an act that it is his duty to do is, if that act or omission is likely to constitute mischief causing actual danger to life, or to constitute mischief in relation to public property or private property, guilty of

(a) an indictable offence and is liable to imprisonment for five years, or

(b) an offence punishable on summary conviction.

(6) No person commits mischief within the meaning of this section by reason only that

(a) he stops work as a result of the failure of his employer and himself to agree upon any matter relating to his employment,

(b) he stops work as a result of the failure of his employer and a bargaining agent acting on his behalf to agree upon any matter relating to his employment, or

(c) he stops work as a result of his taking part in a combination of workmen or employees for their own reasonable protection as workmen or employees.

(7) No person commits mischief within the meaning of this section by reason only that he attends at or near or approaches a dwelling-house or place for the purpose only of obtaining or communicating information.

CONSPIRACY.

423. (2) Every one who conspires with any one

(a) to effect an unlawful purpose, or

(b) to effect a lawful purpose by unlawful means,

is guilty of an indictable offence and is liable to imprisonment for two years.

INFORMATION FOR SEARCH WARRANT — Endorsement of search warrant — Form — Effect of endorsement.

443. (1) A justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in a building, receptacle or place

(a) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed,

(b) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act, or

(c) anything that there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,

may at any time issue a warrant under his hand authorizing a person named therein or a peace officer to search the building, receptacle or place for any such thing, and to seize and carry it before the justice who issued the warrant or some other justice for the same territorial division to be dealt with by him according to law.

(2) Where the building, receptacle, or place in which anything mentioned in subsection (1) is believed to be is in some other territorial division, the justice may issue his warrant in like form modified according to the cir-

cumstances, and the warrant may be executed in the other territorial division after it has been endorsed, in Form 25, by a justice having jurisdiction in that territorial division.

(3) A search warrant issued under this section may be in Form 5.

(4) An endorsement that is made upon a warrant pursuant to subsection (2) is sufficient authority to the peace officers to whom it was originally directed and to all peace officers within the jurisdiction of the justice by whom it is endorsed to execute the warrant and to take the things to which it relates before the justice who issued the warrant or some other justice for the same territorial division.

II

THE OFFICIAL SECRETS ACT

R.S.C. 1970, c. O-3, as amended

An Act respecting official secrets

1. This Act may be cited as the *Official Secrets Act*. Short title

2. (1) In this Act Definitions

"Attorney General" means the Attorney General of Canada; "Attorney General"

"document" includes part of a document; "document"

"intercept" includes listen to, record or acquire a communication or acquire the substance, meaning or purport thereof; "intercept"

"model" includes design, pattern and specimen; "model"

"munitions of war" means arms, ammunition, implements or munitions of war, military stores, or any articles deemed capable of being converted thereinto, or made useful in the production thereof; "munitions of war"

"offence under this Act" includes any act, omission, or other thing that is punishable hereunder; "offence under this Act"

"office under Her Majesty" includes any office or employment in or under any department or branch of the government of Canada or of any province, and any office or employment in, on or under any board, commission, corporation or other body that is an agent of Her Majesty in right of Canada or any province; "office under Her Majesty"

"prohibited place" means "prohibited place"

(a) any work of defence belonging to or occupied or used by or on behalf of Her Majesty including arsenals, armed forces establishments or stations, factories, dockyards, mines, minefields, camps, ships, aircraft, telegraph, telephone, wireless or signal stations or offices, and places used for the purpose of building, repairing, making or storing any munitions of war or any sketches, plans, models, or documents relating thereto, or for the purpose of getting any metals, oil or minerals of use in time of war,

(b) any place not belonging to Her Majesty where any munitions of war or any sketches, models, plans or documents relating thereto, are being made, repaired, obtained or stored under contract with, or with any person on behalf of, Her Majesty, or otherwise on behalf of Her Majesty, and

(c) any place that is for the time being declared by order of the Governor in Council to be a prohibited place on the ground that information with respect thereto or damage thereto would be useful to a foreign power;

"senior police officer" "senior police officer" means any officer of the Royal Canadian Mounted Police not below the rank of inspector, any officer of any provincial police force of a like or superior rank, the chief constable of any city or town with a population of not less than ten thousand, or any person upon whom the powers of a senior police officer are for the purposes of this Act conferred by the Governor in Council;

"sketch" "sketch" includes any mode of representing any place or thing.

Her Majesty (2) In this Act any reference to Her Majesty means Her Majesty in right of Canada or of any province.

(3) In this Act

Communicating or receiving (a) expressions referring to communicating or receiving include any communicating or receiving, whether in whole or in part, and whether the sketch, plan, model, article, note, document or information itself or the substance, effect or description thereof only is communicated or received;

(b) expressions referring to obtaining or retaining any sketch, plan, model, article, note, or document, include the copying of, or causing to be copied, the whole or any part of any sketch, plan, model, article, note or document; and

(c) expressions referring to the communication of any sketch, plan, model, article, note or document include the transfer or transmission of the sketch, plan, model, article, note or document.

Spying **3.** (1) Every person is guilty of an offence under this Act who, for any purpose prejudicial to the safety or interests of the State,

(a) approaches, inspects, passes over, or is in the neighbourhood of, or enters any prohibited place;

(b) makes any sketch, plan, model or note that is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power; or

(c) obtains, collects, records, or publishes, or communicates to any other person any secret official code word, or pass

word, or any sketch, plan, model, article, or note, or other document or information that is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power.

Purpose prejudicial to safety of State

(2) On a prosecution under this section, it is not necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State, and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case, or his conduct, or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State; and if any sketch, plan, model, article, note, document or information relating to or used in any prohibited place, or anything in such a place, or any secret official code word or pass word is made, obtained, collected, recorded, published or communicated by any person other than a person acting under lawful authority, it shall be deemed to have been made, obtained, collected, recorded, published or communicated for a purpose prejudicial to the safety or interests of the State unless the contrary is proved.

Communication with agent of foreign power, etc.

(3) In any proceedings against a person for an offence under this section, the fact that he has been in communication with, or attempted to communicate with, an agent of a foreign power, whether within or outside Canada, is evidence that he has, for a purpose prejudicial to the safety or interests of the State, obtained or attempted to obtain information that is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power.

When deemed to have been in communication

(4) For the purpose of this section, but without prejudice to the generality of the foregoing provision

(a) a person shall, unless he proves the contrary, be deemed to have been in communication with an agent of a foreign power if

(i) he has, either within or outside Canada, visited the address of an agent of a foreign power or consorted or associated with such agent, or

(ii) either within or outside Canada, the name or address of, or any other information regarding such an agent has been found in his possession, or has been supplied by him to any other person, or has been obtained by him from any other person;

(b) "an agent of a foreign power" includes any person who is or has been or is reasonably suspected of being or having been employed by a foreign power either directly or indirectly for the purpose of committing an act, either within or outside Canada, prejudicial to the safety or interests

of the State, or who has or is reasonably suspected of having, either within or outside Canada, committed, or attempted to commit, such an act in the interests of a foreign power; and

(c) any address, whether within or outside Canada, reasonably suspected of being an address used for the receipt of communications intended for an agent of a foreign power, or any address at which such an agent resides, or to which he resorts for the purpose of giving or receiving communications, or at which he carries on any business, shall be deemed to be the address of an agent of a foreign power, and communications addressed to such an address to be communications with such an agent.

Wrongful communication, etc., of information

4. (1) Every person is guilty of an offence under this Act who, having in his possession or control any secret official code word, or pass word, or any sketch, plan, model, article, note, document or information that relates to or is used in a prohibited place or anything in such a place, or that has been made or obtained in contravention of this Act, or that has been entrusted in confidence to him by any person holding office under Her Majesty, or that he has obtained or to which he has had access while subject to the Code of Service Discipline within the meaning of the *National Defence Act* or owing to his position as a person who holds or has held office under Her Majesty, or as a person who holds or has held a contract made on behalf of Her Majesty, or a contract the performance of which in whole or in part is carried out in a prohibited place, or as a person who is or has been employed under a person who holds or has held such an office or contract,

(a) communicates the code word, pass word, sketch, plan, model, article, note, document or information to any person, other than a person to whom he is authorized to communicate with, or a person to whom it is in the interest of the State his duty to communicate it;

(b) uses the information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety or interests of the State;

(c) retains the sketch, plan, model, article, note, or document in his possession or control when he has no right to retain it or when it is contrary to his duty to retain it or fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof; or

(d) fails to take reasonable care of, or so conducts himself as to endanger the safety of the sketch, plan, model, article, note, document, secret official code word or pass word or information.

(2) Every person is guilty of an offence under this Act who, having in his possession or control any sketch, plan, model, article, note, document or information that relates to munitions of war, communicates it directly or indirectly to any foreign power, or in any other manner prejudicial to the safety or interests of the State.

Communication of sketch, plan, model, etc.

(3) Every person who receives any secret official code word, or pass word, or sketch, plan, model, article, note, document or information, knowing, or having reasonable ground to believe, at the time when he receives it, that the code word, pass word, sketch, plan, model, article, note, document or information is communicated to him in contravention of this Act, is guilty of an offence under this Act, unless he proves that the communication to him of the code word, pass word, sketch, plan, model, article, note, document or information was contrary to his desire.

Receiving code word, sketch, etc.

(4) Every person is guilty of an offence under this Act who

Retaining or allowing possession of document, etc.

(a) retains for any purpose prejudicial to the safety or interests of the State any official document, whether or not completed or issued for use, when he has no right to retain it, or when it is contrary to his duty to retain it, or fails to comply with any directions issued by any Government department or any person authorized by such department with regard to the return or disposal thereof; or

(b) allows any other person to have possession of any official document issued for his use alone, or communicates any secret official code word or pass word so issued, or, without lawful authority or excuse, has in his possession any official document or secret official code word or pass word issued for the use of some person other than himself, or on obtaining possession of any official document by finding or otherwise, neglects or fails to restore it to the person or authority by whom or for whose use it was issued, or to a police constable.

5. (1) Every person is guilty of an offence under this Act who, for the purpose of gaining admission, or of assisting any other person to gain admission, to a prohibited place, or for any other purpose prejudicial to the safety or interests of the State,

Unauthorized use of uniforms; falsification of reports, forgery, personation and false documents

(a) uses or wears, without lawful authority, any military, police or other official uniform or any uniform so nearly resembling the same as to be calculated to deceive, or falsely represents himself to be a person who is or has been entitled to use or wear any such uniform;

(b) orally, or in writing in any declaration or application, or in any document signed by him or on his behalf, know-

ingly makes or connives at the making of any false statement or any omission;

(c) forges, alters, or tampers with any passport or any military, police or official pass, permit, certificate, licence or other document of a similar character, (hereinafter in this section referred to as an official document), or uses or has in his possession any such forged, altered, or irregular official document;

(d) personates, or falsely represents himself to be a person holding, or in the employment of a person holding, office under Her Majesty, or to be or not to be a person to whom an official document or secret official code word or pass word has been duly issued or communicated, or with intent to obtain an official document, secret official code word or pass word, whether for himself or any other person, knowingly makes any false statement; or

(e) uses, or has in his possession or under his control, without the authority of the Government department or the authority concerned, any die, seal, or stamp of or belonging to, or used, made, or provided by any Government department, or by any diplomatic or military authority appointed by or acting under the authority of Her Majesty, or any die, seal or stamp, so nearly resembling any such die, seal or stamp as to be calculated to deceive, or counterfeits any such die, seal or stamp, or uses, or has in his possession, or under his control, any such counterfeited die, seal or stamp.

Unlawful dealing with dies, seals, etc.

(2) Every person who, without lawful authority or excuse, manufactures or sells, or has in his possession for sale any such die, seal or stamp as aforesaid, is guilty of an offence under this Act.

Interference

6. No person in the vicinity of any prohibited place shall obstruct, knowingly mislead or otherwise interfere with or impede any constable or police officer, or any member of Her Majesty's forces engaged on guard, sentry, patrol, or other similar duty in relation to the prohibited place, and every person who acts in contravention of, or fails to comply with, this provision, is guilty of an offence under this Act.

Telegrams

7. (1) Where it appears to the Minister of Justice that such a course is expedient in the public interest, he may, by warrant under his hand, require any person who owns or controls any telegraphic cable or wire, or any apparatus for wireless telegraphy, used for the sending or receipt of telegrams to or from any place out of Canada, to produce to him, or to any person named in the warrant, the originals and transcripts, either of all telegrams, or of telegrams of any specified class or description, or of telegrams sent from or addressed to any specified person or place, sent to or

received from any place out of Canada by means of any such cable, wire, or apparatus and all other papers relating to any such telegram as aforesaid.

Refusing or neglecting to produce

(2) Every person who, on being required to produce any such original or transcript or paper as aforesaid, refuses or neglects to do so is guilty of an offence under this Act, and is for each offence, liable on summary conviction to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding two hundred dollars, or to both imprisonment and fine.

Harbouring spies

8. Every person who knowingly harbours any person whom he knows, or has reasonable grounds for supposing, to be a person who is about to commit or who has committed an offence under this Act, or knowingly permits to meet or assemble in any premises in his occupation or under his control any such persons, and every person who, having harboured any such person, or permitted any such persons to meet or assemble in any premises in his occupation or under his control, wilfully omits or refuses to disclose to a senior police officer any information that it is in his power to give in relation to any such person, is guilty of an offence under this Act.

Attempts, incitements, etc.

9. Every person who attempts to commit any offence under this Act, or solicits or incites or endeavours to persuade another person to commit an offence, or aids or abets and does any act preparatory to the commission of an offence under this Act, is guilty of an offence under this Act and is liable to the same punishment, and to be proceeded against in the same manner, as if he had committed the offence.

Power to arrest without warrant

10. Every person who is found committing an offence under this Act, or who is reasonably suspected of having committed, or having attempted to commit, or being about to commit, such an offence, may be arrested without a warrant and detained by any constable or police officer.

Search warrants

11. (1) If a justice of the peace is satisfied by information on oath that there is reasonable ground for suspecting that an offence under this Act has been or is about to be committed, he may grant a search warrant authorizing any constable named therein, to enter at any time any premises or place named in the warrant, if necessary by force, and to search the premises or place and every person found therein, and to seize any sketch, plan, model, article, note or document, or anything that is evidence of an offence under this Act having been or being about to be committed, that he may find on the premises or place or on any such person, and with regard to or in connection with which he has reasonable ground for suspecting that an offence under this Act has been or is about to be committed.

In case of great emergency

(2) Where it appears to an officer of the Royal Canadian Mounted Police not below the rank of superintendent that the case is one of great emergency and that in the interest of the State immediate action is necessary, he may by a written order under his hand give to any constable the like authority as may be given by the warrant of a justice under this section.

Consent of Attorney General

12. A prosecution for an offence under this Act shall not be instituted except by or with the consent of the Attorney General; except that a person charged with such an offence may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody or on bail, notwithstanding that the consent of the Attorney General to the institution of a prosecution for the offence has not been obtained, but no further or other proceedings shall be taken until that consent has been obtained.

Offences committed outside Canada

13. An act, omission or thing that would, by reason of this Act, be punishable as an offence if committed in Canada, is, if committed outside Canada, an offence against this Act, triable and punishable in Canada, in the following cases:

(a) where the offender at the time of the commission was a Canadian citizen within the meaning of the *Canadian Citizenship Act*; or

(b) where any code word, pass word, sketch, plan, model, article, note, document, information or other thing whatever in respect of which an offender is charged was obtained by him, or depends upon information that he obtained, while owing allegiance to Her Majesty.

Where offence deemed to have been committed

14. (1) For the purposes of the trial of a person for an offence under this Act, the offence shall be deemed to have been committed either at the place in which the offence actually was committed, or at any place in Canada in which the offender may be found.

Public may be excluded from trial

(2) In addition and without prejudice to any powers that a court may possess to order the exclusion of the public from any proceedings if, in the course of proceedings before a court against any person for an offence under this Act or the proceedings on appeal, application is made by the prosecution, on the ground that the publication of any evidence to be given or of any statement to be made in the course of the proceedings would be prejudicial to the interest of the State, that all or any portion of the public shall be excluded during any part of the hearing, the court may make an order to that effect, but the passing of sentence shall in any case take place in public.

(3) Where the person guilty of an offence under this Act is a company or corporation, every director and officer of the company or corporation is guilty of the like offence unless he proves that the act or omission constituting the offence took place without his knowledge or consent.

Where guilty person a company or corporation

15. (1) Where no specific penalty is provided in this Act, any person who is guilty of an offence under this Act shall be deemed to be guilty of an indictable offence and is, on conviction, punishable by imprisonment for a term not exceeding fourteen years; but such person may, at the election of the Attorney General, be prosecuted summarily in the manner provided by the provisions of the *Criminal Code* relating to summary convictions, and, if so prosecuted, is punishable by a fine not exceeding five hundred dollars, or by imprisonment not exceeding twelve months, or by both.

Penalties

(2) Any person charged with or convicted of an offence under this Act shall, for the purposes of the *Identification of Criminals Act*, be deemed to be charged with or convicted of an indictable offence notwithstanding that such person is prosecuted summarily in the manner provided by the provisions of the *Criminal Code* relating to summary convictions.

Application of *Identification of Criminals Act*

16. (1) Part IV.1 of the *Criminal Code* does not apply to any person who makes an interception pursuant to a warrant or to any person who in good faith aids in any way a person whom he has reasonable and probable grounds to believe is acting in accordance with a warrant, and does not affect the admissibility of any evidence obtained thereby and no action lies under Part I.1 of the *Crown Liability Act* in respect of such an interception.

Criminal Code and Crown Liability Act not applicable

(2) The Solicitor General of Canada may issue a warrant authorizing the interception or seizure of any communication if he is satisfied by evidence on oath that such interception or seizure is necessary for the prevention or detection of subversive activity directed against Canada or detrimental to the security of Canada or is necessary for the purpose of gathering foreign intelligence information essential to the security of Canada.

Warrant issued by Solicitor General of Canada

(3) For the purposes of subsection (2), "subversive activity" means

Meaning of "subversive activity"

(a) espionage or sabotage;

(b) foreign intelligence activities directed toward gathering intelligence information relating to Canada;

(c) activities directed toward accomplishing governmental change within Canada or elsewhere by force or violence or any criminal means;

(d) activities by a foreign power directed toward actual or potential attack or other hostile acts against Canada; or

(e) activities of a foreign terrorist group directed toward the commission of terrorist acts in or against Canada.

Contents of warrant

(4) A warrant issued pursuant to subsection (2) shall specify

(a) the type of communication to be intercepted or seized;

(b) the person or persons who may make the interception or seizure; and

(c) the length of time for which the warrant is in force.

Annual report

(5) The Solicitor General of Canada shall, as soon as possible after the end of each year, prepare a report relating to warrants issued pursuant to subsection (2) and to interceptions and seizures made thereunder in the immediately preceding year setting forth

(a) the number of warrants issued pursuant to subsection (2),

(b) the average length of time for which warrants were in force,

(c) a general description of the methods of interception or seizure utilized under the warrants, and

(d) a general assessment of the importance of warrants issued pursuant to subsection (2) for the prevention or detection of subversive activity directed against Canada or detrimental to the security of Canada and for the purpose of gathering foreign intelligence information essential to the security of Canada,

and a copy of each such report shall be laid before Parliament forthwith upon completion thereof or, if Parliament is not then sitting on any of the first fifteen days next thereafter that Parliament is sitting."

III

THE WAR MEASURES ACT

R.S.C. 1970, c. W-2

An Act to confer certain powers upon the Governor in Council in the event of war, invasion, or insurrection

SHORT TITLE

1. This Act may be cited as the *War Measures Act*. Short title

EVIDENCE OF WAR

2. The issue of a proclamation by Her Majesty, or under the authority of the Governor in Council shall be conclusive evidence that war, invasion, or insurrection, real or apprehended, exists and has existed for any period of time therein stated, and of its continuance, until by the issue of a further proclamation it is declared that the war, invasion or insurrection no longer exists. Evidence of war, etc.

POWERS OF THE GOVERNOR IN COUNCIL

3. (1) The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council extend to all matters coming within the classes of subjects hereinafter enumerated, namely, Special powers of Governor in Council

(a) censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;

(b) arrest, detention, exclusion and deportation;

(c) control of the harbours, ports and territorial waters of Canada and the movements of vessels;

(d) transportation by land, air, or water and the control of the transport of persons and things;

(e) trading, exportation, importation, production and manufacture;

(f) appropriation, control, forfeiture and disposition of property and of the use thereof.

Force of law

(2) All orders and regulations made under this section have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation; but if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder, is affected thereby, nor is any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder affected by such variation, extension or revocation.

Imposing penalties

4. The Governor in Council may prescribe the penalties that may be imposed for violations of orders and regulations made under this Act, and may also prescribe whether such penalties shall be imposed upon summary conviction or upon indictment, but no such penalty shall exceed a fine of five thousand dollars or imprisonment for any term not exceeding five years, or both.

No release of arrested alien

5. No person who is held for deportation under this Act or under any regulation made thereunder, or is under arrest or detention as an alien enemy, or upon suspicion that he is an alien enemy, or to prevent his departure from Canada, shall be released upon bail or otherwise discharged or tried, without the consent of the Minister of Justice.

Coming into force by proclamation

6. (1) Sections 3, 4 and 5 come into force only upon the issue of a proclamation of the Governor in Council declaring that war, invasion or insurrection, real or apprehended, exists.

Proclamation to be submitted to Parliament

(2) A proclamation declaring that war, invasion or insurrection, real or apprehended, exists shall be laid before Parliament forthwith after its issue, or, if Parliament is then not sitting, within the first fifteen days next thereafter that Parliament is sitting.

Opportunity for debate

(3) Where a proclamation has been laid before Parliament pursuant to subsection (2), a notice of motion in either House signed by ten members thereof and made in accordance with the rules of that House within ten days of the day the proclamation was laid before Parliament, praying that the proclamation be revoked, shall be debated in that House at the first convenient opportunity within the four sitting days next after the day the motion in that House was made.

Revocation of proclamation by resolution

(4) If both Houses of Parliament resolve that the proclamation be revoked, it ceases to have effect, and sections 3, 4 and 5 cease to be in force until those sections are again brought into force

by a further proclamation but without prejudice to the previous operation of those sections or anything duly done or suffered thereunder or any offence committed or any penalty or forfeiture or punishment incurred.

Canadian Bill of Rights

(5) Any act or thing done or authorized or any order or regulation made under the authority of this Act, shall be deemed not to be an abrogation, abridgement or infringement of any right or freedom recognized by the *Canadian Bill of Rights*.

PROCEDURE

Fixing compensation

7. Whenever any property or the use thereof has been appropriated by Her Majesty under this Act, or any order in council, order or regulation made thereunder, and compensation is to be made therefor and has not been agreed upon, the claim shall be referred by the Minister of Justice to the Exchequer Court of Canada, or to a superior or county court of the province within which the claim arises, or to a judge of any such court.

Forfeitures

8. Any ship or vessel used or moved, or any goods, wares or merchandise dealt with, contrary to any order or regulation made under this Act, may be seized and detained and shall be liable o forfeiture, at the instance of the Minister of Justice, upon proceedings in the Exchequer Court of Canada or in any superior court.

Rules

9. Every court mentioned in sections 7 and 8 may make rules governing the procedure upon any reference made to, or proceedings taken before, such court or a judge thereof under those sections.